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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1966

No. 78

DEPARTMENT OF EMPLOYMENT, ET AL.,
APPELLANTS,

vs.

UNITED STATES, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

FILED FEBRUARY 28, 1966
JURISDICTION POSTPONED MAY 23, 1966

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. .....

THE AMERICAN NATIONAL RED CROSS and THE UNITED STATES OF AMERICA, Plaintiffs,

v.

DEPARTMENT OF EMPLOYMENT, and BERNARD E. TEETS, Executive Director of Employment of the Department of Employment, Defendants.

COMPLAINT—Filed October 7, 1963

The American National Red Cross and the United States of America, by their undersigned attorneys, allege that:

1. Plaintiff The American National Red Cross (hereinafter sometimes referred to as "Red Cross") is a body corporate and politic in the District of Columbia, organized and existing by virtue of an act of the Congress of the United States of America (Title 36 U.S.C. Sec. 1 et seq.) and does not have its principal place of business in the State of Colorado.

2. Plaintiff United States of America is a corporate sovereign and body politic.

3. Defendant Department of Employment (hereinafter sometimes referred to as "Department") is an agency of the State of Colorado, charged with the function of administering the Employment Security Act of the State of Colorado (Colorado Revised Statutes 1953, as amended, Chapter 82) hereinafter referred to as the "Act."

[File endorsement omitted]

4. Defendant Bernard E. Teets is the Executive Director of Employment and as such is head of the Department.

5. Jurisdiction of this court rests on (a) Title 28 U.S.C. Sec. 1331, the amount in controversy exceeding ten thousand ($10,000) dollars, exclusive of interest and costs, and the suit arising under the Constitution and laws of the United States; and (b) Title 28 U.S.C. Sec. 1345, this being a civil suit commenced by the United States.

[fol. 2] 6. Red Cross is an instrumentality of plaintiff United States of America and, as such, enjoys immunity, under the federal Constitution, from state and local taxation.

7. The Department determined that Red Cross employment in Colorado was subject to the Act and demanded that it make payment of the contributions provided for by Article 6 thereof and, in accordance with Article 9 of the Act, interest on contributions which were claimed to be past due.

8. Thereafter, Red Cross, in compliance with the Department's demand, involuntarily and under threat and fear of sanctions provided for by the Act, paid defendants under protest and applied to the Department for refund of an amount in excess of $10,000. The Department denied Red Cross' applications for refund.

9. Red Cross made said protests and applications for refund of payments, and now rests this action, on the ground that it is an instrumentality of the United States of the kind described by Title 26 U.S.C. Section 3306(c)(6)(B) and, as such, continues, because of the express exception made in Title 26 U.S.C. Section 3305(b), to be immune, under the federal Constitution, from any requirement to make contributions to any unemployment fund under a State unemployment compensation law.

10. Red Cross contends that it is an instrumentality of the United States of the kind described by Title 26 U.S.C. Section 3306(c)(6)(B) because subdivision 8 of Section 3306(c) (which specifically refers to Section 3301 of Title

26 U.S.C.) exempts Red Cross (which is an organization described in Title 26 U.S.C. Section 501(c)(3) and exempt from income tax under Title 26 U.S.C. Section 501(a)) from the application of Section 3301.

11. The Department takes, and in making its said determination and demand and denying said applications for refund took, the position that Congress, by Title 26 U.S.C. Section 3305(b), has subjected Red Cross to, rather than excepted it from the requirement of making contributions to unemployment funds under State unemployment compensation laws.

[fol. 3] 12. The United States of America agrees with Red Cross and disagrees with the Department in their respective interpretations of Title 26 Section 3305(b) and 3306(c)(6), and has joined in this action, under the direction and authorization of its Attorney General, because of its interest as sovereign, in having Sections 3305(b) and 3306(c)(6) properly construed and applied, and avoiding infringement of the immunity from state and local taxation which the United States and Red Cross, as its instrumentality, performing functions essential to the military and civil interests of the United States, enjoy under the federal Constitution.

13. Since Congress has not consented thereto, exaction by defendants from Red Cross of the contributions and interest charges provided for by the Act is in violation of the federal Constitution; and the Act, insofar as it provides for such exactions from Red Cross, is unconstitutional.

14. Defendants threaten to impose all penalties and interest charges, and resort to all summary remedies for collection of contributions, interest and penalties, provided for by the Act, if Red Cross does not continue making payments when claimed to be due thereunder.

15. No plain, speedy, and efficient remedy is available to Red Cross in the courts of Colorado, against defendants

threatened enforcement of the Act, in that, among other things, the Act provides that all refunds of moneys erroneously paid thereunder shall be without interest.

16. Red Cross will suffer irreparable injury unless defendants are permanently enjoined from assessing or collecting any contributions, interest or penalties under the Act against Red Cross, in that, among other things, it will be put to the expense and inconvenience of multiple suits as plaintiff or defendant.

17. The relief prayed for herein requires this case to be heard by a court of three judges.

Wherefore, plaintiffs pray judgment as follows:

1. Declaring that application of the Act to Red Cross is unconstitutional; and

2. Directing defendants to refund to Red Cross all sums heretofore or hereafter collected by them from it under [fol. 4] the Act, together with interest on each such sum from the respective date of receipt thereof; and

3. Permanently enjoining defendants, their officers, agents, servants, employees and attorneys, from assessing or collecting any contributions, interest or penalties under the Act from Red Cross; and

4. Granting plaintiffs such other and further relief, including costs, as may be just and proper in the premises.

Jack D. Henderson, Attorney for Plaintiff, The American National Red Cross, First National Bank Building, Denver, Colorado, AM 6-3327.

Lawrence M. Henry, United States Attorney for the District of Colorado, Attorney for Plaintiff, United States of America, 348 Post Office Building, Denver, Colorado, 534-4151, Ext. 541.

[fol. 5]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

[Title omitted]

MOTION TO STRIKE PORTION OF COMPLAINT—
Filed October 28, 1963

Defendants, Department of Employment and Bernard E. Teets, through their attorneys, Duke W. Dunbar, Attorney General, Frank E. Hickey, Deputy Attorney General, and James D. McKevitt, Assistant Attorney General, move to strike paragraph 12 of Plaintiff's Complaint, and, as grounds therefor, state:

That this allegation is immaterial to the Plaintiff's claim for relief.

Duke W. Dunbar, Attorney General; Frank E. Hickey, Deputy Attorney General; James D. McKevitt, Asst. Attorney General, By James D. McKevitt, Asst. Attorney General.

[File endorsement omitted]

[fol. 6]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

[Title omitted]

MOTIONS TO DISMISS—Filed October 28, 1963

Defendants, Department of Employment and Bernard E. Teets, through their attorneys, Duke W. Dunbar, Attorney General, Frank E. Hickey, Deputy Attorney General, and James D. McKevitt, Assistant Attorney General, move to dismiss the claims of the Plaintiffs, and as grounds therefor, state:

[File endorsement omitted]

1. The Court does not have jurisdiction over the subject matter.

2. The Court does not have jurisdiction over the Defendants.

Motion to Dismiss Against the United States of America

In the alternative, Defendants, Department of Employment and Bernard E. Teets, move to dismiss the claims of the United States of America, and, as grounds therefor, state:

That the Plaintiff, United States of America, has failed to state a claim upon which relief can be granted.

Duke W. Dunbar, Attorney General; Frank E. Hickey, Deputy Attorney General; James D. McKevitt, Asst. Attorney General, By James D. McKevitt, Asst. Attorney General.

[fol. 7] Certificate of Mailing (omitted in printing).

[fol. 8]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 8233

[Title omitted]

MOTION OF PLAINTIFFS FOR SUMMARY JUDGMENT—
Filed November 21, 1963

Plaintiffs, by their respective undersigned attorneys, move the court as follows:

1. Pursuant to Rule 56 of the Federal Rules of Civil Procedure, for a summary judgment granting the relief prayed in the complaint on the grounds that there is no genuine issue as to any material fact, and that on the estab-

[File endorsement omitted]

lished facts plaintiffs are entitled in law to the relief prayed; and, in the alternative,

2. If plaintiffs are not granted summary judgment on the whole case or for all the relief prayed, and a trial is necessary, the court, at the hearing of this motion, by examining the complaint and the evidence before it and by interrogating counsel, ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted, and thereupon make an order specifying the facts that appear without substantial controversy and directing such further proceedings in the action as are just.

This motion is based upon:

(a) Plaintiffs' complaint filed herein; and

(b) The annual report for the year ended June 30, 1962, of which a copy is attached to Plaintiffs' Memorandum In Opposition To Defendants' Motions To Dismiss and To Strike filed herein; and

[fol. 9] (c) The attached affidavits sworn to November 20, 1963, by Harold W. Starr and Presnell K. Betts.

Lawrence M. Henry, United States Attorney.

Jack D. Henderson, Attorney for Plaintiff, The American National Red Cross.

November 20, 1963.

[fol. 24]
[Stamp—Filed—United States District Court—Denver, Colorado—Jan 10 1964—G. Walter Bowman, Clerk—By Dep. Clerk]

Form No. USA-20
(Rev. 10-9-58)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Civil No. 8233

THE AMERICAN NATIONAL RED CROSS, et al., Plaintiffs,

v.

DEPARTMENT OF EMPLOYMENT, et al., Defendants.

CERTIFICATE OF SERVICE BY MAIL

The undersigned hereby certifies that he is an employee in the Office of the United States Attorney for the District of Colorado, and is a person of such age and discretion as to be competent to serve papers.

That on January 10, 1964, he served a copy of the attached 1) Plaintiffs' Reply Brief; 2) Reply Affidavit in Support of Plaintiffs' Motion for Summary Judgment; 3) Reply Affidavit in Support of Plaintiffs' Motion for Summary Judgment by placing said copy in a postpaid envelope addressed to the person hereinafter named, at the place and address stated below, which is the last known address, and by depositing said envelope and contents in the United States Mail at Denver, Colorado.

Addressee:

Mr. James D. McKevitt
Assistant Attorney General
State Capitol
Denver, Colorado 80203

Arthur L. Fine, Assistant United States Attorney, for the District of Colorado.

[fol. 25]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

[Title omitted]

ORDER ON MOTIONS—March 18, 1964

This Cause came before this Statutory Court on the motions of the parties and after hearing the arguments of counsel, it is,

Ordered as follows:

1) That the defendants' motion to strike paragraph 12 of the complaint be granted.

2) That the defendants' motion to dismiss is granted only as to the plaintiff, The United States of America.

3) That the motions for summary judgment of both the plaintiffs and defendants be denied.

4) That the defendants shall have fifteen days within which to file an answer to the complaint.

Dated at Denver, Colorado, this 4th day of March, 1964.

[fol. 26] By the Court:

Oliver Seth, Circuit Judge, United States Court of Appeals;

Alfred A. Arraj, Chief Judge, United States District Court;

Hatfield Chilson, Judge, United States District Court.

[File endorsement omitted]

[fol. 27]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 8233

[Title omitted]

ANSWER—Filed March 26, 1964

Defendants, Department of Employment and Bernard E. Teets, through their attorneys, Duke W. Dunbar, Attorney General, Frank E. Hickey, Deputy Attorney General, and James D. McKevitt, Assistant Attorney General, in response to order of Court to hereby submit their Answer to the Plaintiff's Complaint:

1. The Defendants are without sufficient information or knowledge to form a belief as to the provisions of paragraph 1 and 2 of Plaintiff's Complaint and therefore deny each and every allegation thereof.

2. Defendants admit that the Colorado Department of Employment is an agency of the State of Colorado and that the Defendant, Bernard E. Teets is the Executive [fol. 28] Director thereof: Defendants further admit that the Colorado Department of Employment has previously ruled that the Plaintiff, American National Red Cross, is a subject employer under the provisions of the Colorado Employment Security Act, Chapter 82, 1953 C.R.S., and is liable for the payment of contributions and/or taxes as is required under the provisions of this Act.

3. Defendants deny each and every other allegation of the Plaintiff's Complaint not previously admitted herein.

[File endorsement omitted]

First Affirmative Defense

As a separate and affirmative defense to the Plaintiff's Complaint, Defendants allege that this Court does not have jurisdiction over the subject matter.

Second Affirmative Defense

As a separate and affirmative defense to the Plaintiff's Complaint, Defendants allege that this Court does not have jurisdiction over the Defendants.

Third Affirmative Defense

As a separate and affirmative defense Defendants submit that the Plaintiff, American National Red Cross has failed to exhaust its administrative and statutory remedies afforded to and required of it under the provisions of Section 82-9-9, 1953 Colorado Revised Statutes.

[fol. 29] Fourth Affirmative Defense

The Plaintiffs have failed to state a claim upon which relief can be granted.

Wherefore, Defendants pray that the Plaintiff's Complaint be dismissed and the Defendants have their costs.

Duke W. Dunbar, Attorney General; Frank E. Hickey, Deputy Attorney General; James D. McKevitt, Assistant Attorney General; By James D. McKevitt, Assistant Attorney General.

Defendant's Address: 1210 Sherman Street, Denver, Colorado 80203.

[fol. 30] Certificate of Mailing (omitted in printing).

[fol. 31]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

[Title omitted]

MOTION FOR REHEARING—Filed April 7, 1964

The American National Red Cross and The United States of America, by their undersigned attorneys, hereby move for rehearing of defendants' motions to (1) dismiss the claims of The United States of America and (2) strike paragraph "12" of the complaint, for the following reasons:

1. The striking of paragraph "12" and the dismissal of the United States are inconsistent with the denial of defendants' motion for summary judgment, and contrary to the Tenth Circuit's holding in *United States and Phillips Petroleum Company* v. *Bureau of Revenue*, 291 F. 2d 677. Here, as there:

> The action pleaded • • • is essentially • • • to assert the constitutional immunity of the United States from taxation by the state. The United States is the proper party to prosecute an action to protect its sovereign rights [citing *United States* v. *Allegheny County*, 322 U.S. 174, 191]. It is the real party in interest. If immunity from the state tax exists, it is in behalf of the United States. The exaction of the tax can only be resisted on such ground by the Government or one who stands in its shoes. If the taxpayer has any right to assert the Government's immunity, it is a 'derivative one.' (291 F. 2d 677, 678-9)

Thus, unless and until this Court holds that Red Cross is not a federal instrumentality, dismissal of the United States for failure to state a claim on which relief may be granted is premature. The Court, by denying defendants' motion for summary judgment, necessarily reserved deci-

[File endorsement omitted]

sion on Red Cross' status until the trial. It should also, therefore, have denied defendants' motion to dismiss as against the United States and, thereby, likewise reserved until trial decision on whether the Government has stated a claim upon which relief may be granted.

[fol. 32] Or, differently stated, paragraph "6" of the complaint, which alleges that Red Cross is a tax immune federal instrumentality, must, for purposes of defendants' motion to dismiss, be accepted as true; particularly since this Court, in denying defendants' motion for summary judgment, has refused to hold that Red Cross is not such an instrumentality as a matter of law. And clearly, under *Phillips* and *Allegheny County, supra,* the United States may sue to avoid infringement of the sovereign immunity from state taxation which it and its instrumentalities enjoy.

2. Since dismissal of the United States is premature, so is the striking of paragraph "12" of the complaint, which is relevant and material because it makes clear that the nature of the Government's claim is such as to afford jurisdiction here under 28 U.S.C. 1331 as well as under 28 U.S.C. 1345.

3. Plaintiffs are anxious to avoid the delay and burden on the Court and the parties that would be entailed by a direct appeal to the Supreme Court at this stage of the proceedings. However, there appears to be some doubt as to whether the United States may, without prejudice to its rights, await the final judgment before appealing from the order entered herein on March 16, 1964.

4. That doubt and any thought of need for an appeal to the Supreme Court before trial would be removed if this Court entertains this motion for rehearing and either (a) postpones its decision on rehearing until after the trial or (b) prior to trial, modifies its order of March 16, 1964, so as to substitute for the present provisions which strike paragraph "12" of the complaint and dismiss the United States, new provisions which deny defendants' mo-

tions to strike and to dismiss the United States on the ground that it has failed to state a claim upon which relief can be granted.

Wherefore, it is respectfully prayed that an order entertaining this motion for rehearing be entered forthwith; and that on rehearing, which may await the trial, the order of March 16, 1964, be modified so as to substitute for the [fol. 33] present provisions striking paragraph "12" of the complaint and dismissing the United States, new provisions denying defendants' motions to strike and to dismiss the United States.

Jack D. Henderson, Attorney for Plaintiff, The American National Red Cross.

Lawrence M. Henry, United States Attorney.

William Massar, Attorney, Tax Division, United States Department of Justice.

[fol. 40]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

[Title omitted]

PRE-TRIAL ORDER—July 31, 1964

1. Date and Appearances

Pre-Trial Conference held July 28, 1964.

Appearances: Jack D. Henderson for plaintiff The American National Red Cross; John L. Currin, of counsel, for plaintiff The American National Red Cross; William Massar for The United States of America and of counsel for plaintiff The American National Red Cross; James D. McKevitt, Assistant Attorney General, for defendants.

[File endorsement omitted]

2. Jurisdiction

The Court finds that it has jurisdiction over the parties and the subject matter.

3. Amendments to Pleadings: None.

4. Preliminary Motions Remaining to Be Determined

The motion for rehearing of defendants' motions to (a) dismiss the claim of the United States of America, and (b) strike paragraph "12" of the complaint, shall be disposed of, without further argument, oral or written, simultaneously with the disposition by the Court of all other issues after trial. It is the understanding of the parties and the Judge presiding at the pre-trial conference that the time to appeal from the disposition of defendants' said motions will not begin to run until the disposition of the motion for rehearing.

[fol. 41] 5. (A) General Nature of the Claims of the Parties

(a) Plaintiff's claim:

This is an action for (1) a declaration that application of the Colorado Employment Security Act (Colorado Revised Statutes 1953, as amended, Chapter 82) to plaintiff The American National Red Cross is unconstitutional, (2) an injunction enjoining its application to Red Cross, and (3) the recovery of payments thereunder which Red Cross has made involuntarily and under protest. Entitlement to the relief requested is predicated on the ground that Red Cross, as an instrumentality of the United States, is immune under the Federal Constitution from the application of the Colorado Employment Security Act and that Congress has not waived that immunity.

(b) Defendants claim:

Defendants contend that Red Cross is not an instrumentality of the United States and that, in any event, Congress has by the 1960 amendments to the Federal Unemployment

Tax Act waived whatever immunity Red Cross had with respect to the application of the Colorado Employment Security Act under the Federal Constitution.

(B) Uncontroverted Facts

1. Plaintiff The American National Red Cross (hereinafter sometimes referred to as "Red Cross") is organized and exists by virtue of an act of the Congress of the United States of America (Title 36 USC Sec. 1 et seq.) which provides that it is a body corporate and politic in the District of Columbia. Red Cross does not have its principal place of business in the State of Colorado.

2. The United States of America is a corporate sovereign and body politic.

[fol. 42] 3. Defendant Department of Employment (hereinafter sometimes referred to as "Department") is an agency of the State of Colorado, charged with the function of administering the Employment Security Act of the State of Colorado (Colorado Revised Statutes 1953, as amended, Chapter 82) hereinafter referred to as the "Act".

4. Defendant Bernard E. Teets is the Executive Director of Employment and as such is head of the Department.

5. The Department determined that employment in Colorado was subject to the Act and demanded that payment by Red Cross and certain of its chapters be made of the contributions and interest provided for by the Act.

6. Thereafter and prior to the commencement of this action, payments aggregating more than $10,000 were made involuntarily and under protest to defendants. Part of said payments was forwarded from the office of The American National Red Cross in Washington, D.C. and parts were forwarded from the offices of various Red Cross chapters located in Colorado. The parts forwarded by any one such office did not aggregate $10,000.

7. Each of said payments was accompanied by an application for refund, each of which was denied by defendants prior to the commencement of this action.

8. The American National Red Cross is a charitable organization described in 26 USC Section 501(c)(3) and exempt from United States Income Tax under Title 26 USC Section 501(a).

9. Defendants claim that if Red Cross does not make payments which they claim continue to become due under [fol. 43] the Act, Red Cross will be subject to the penalties, interest charges and remedies for collection of contributions, interest and penalties provided for by the Act.

10. Colorado Law does not provide for interest with respect to refunded contributions under the Act.

6. Issues of Fact and Law

The contested issues are:

1. Whether Red Cross and its chapters are instrumentality or instrumentalities or agency or agencies of the United States.

2. Whether Congress by the 1960 amendments to the Federal Unemployment Tax Act has waived Red Cross' constitutional immunity from the application of the Colorado Employment Security Act.

3. Whether the chapters in Colorado of The American National Red Cross are each juridical entities separate and apart from each other and from plaintiff, The American National Red Cross.

4. Whether plaintiff is precluded from obtaining relief in this Court because it has not brought suit in the District Court for the City and County of Denver as provided for in Section 82-9-9 of the Act.

5. Whether Red Cross is entitled to interest on any refunds which may be granted by this Court.

7. Witnesses

(a) In the absence of 30 days notice to opposing counsel to the contrary, plaintiff will call, or will have available at the trial:

[fol. 44] 1. Philip Schenkenberg, Area Manager, Midwestern Area, The American National Red Cross, St. Louis, Missouri.

2. An officer or employee of the United States Department of Defense who is familiar with the duties and activities of Red Cross in providing assistance to the military establishment and relief and welfare services to the armed forces.

3. An officer or employee of the United States State Department familiar with the duties and activities of the United States under the Treaties of Geneva or the Treaties of the Red Cross, and the duties and activities of Red Cross in relation thereto and in relation to other international matters.

4. An officer or employee of the Executive Office of the President, Office of Emergency Planning, who is familiar with the duties and activities of the United States in relation to disaster relief and the duties and activities of the Red Cross in connection therewith.

(b) In the absence of 30 days notice to opposing counsel to the contrary, defendant will call, or will have available at the trial, Joseph F. Lipersick, Job Insurance Chief, Colorado Department of Employment, 1210 Sherman Street, Denver, Colorado, or his successor in office.

Additional witnesses may be called by any party provided a notice setting forth the names and addresses of the witnesses and a brief resume of the substance of their testimony is filed with the Clerk of the Court and a copy of the notice is furnished to opposing counsel at least fifteen days prior to trial.

[fol. 45] 8. Exhibits

Defendants waive certification and authentication of copies of any documents listed in the attached list of 61 items, or which were offered as exhibits on the deposition of Philip Schenkenberg, which plaintiff may wish to offer in evidence, but reserve the right to object to the admissibility of any such documents on other evidentiary grounds.

Copies of any additional exhibits which any party may wish to offer in evidence shall be filed with the Clerk of the Court and furnished to opposing counsel at least fifteen days before trial.

9. Discovery

Defendants' counsel shall be furnished, not later than August 22, 1964, with the names and addresses of the witnesses, or their alternates, referred to in 7 (a) (2) (3) and (4) supra. All discovery proceedings shall be completed by November 1, 1964.

10. Miscellaneous Orders

None

11. Modifications—Interpretation

Hereafter, this Order will control the course of the trial and may not be amended except by consent of the parties and the Court or by order of the Court to prevent manifest injustice. The pleadings will be deemed merged herein. In the event of ambiguity in any provision of this Order, reference may be made to the records of this conference to the extent reported by stenographic notes, and to the pleadings.

[fol. 46] 12. Trial and Estimated Time

Trial before a three judge court is estimated to take approximately one and a half days.

Done in Open Court on July 31, 1964.

By the Court:

Alfred A. Arraj, Judge.

Approved:

Jack D. Henderson, Attorney for Plaintiff The American National Red Cross.

Lawrence M. Henry, United States Attorney.

William Massar, Attorney, Tax Division, United States Department of Justice.

Duke W. Dunbar, Attorney General; Frank E. Hickey, Deputy Attorney General; James D. McKevitt, Assistant Attorney General, By James D. McKevitt, Assistant Attorney General.

[fol. 52]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 8233

THE AMERICAN NATIONAL RED CROSS, Plaintiff,

vs.

DEPARTMENT OF EMPLOYMENT, and BERNARD E. TEETS, Executive Director of Employment of the Department of Employment, Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW—
September 8, 1965

The plaintiff appeared by William Massar, Esquire, of the Department of Justice, Washington, D. C., John L. Currin, Esquire, of the General Counsellor's Office of The American National Red Cross, Washington, D. C., and

Jack D. Henderson, Esquire, First National Bank Building, Denver, Colorado; the defendants appeared by James D. McKevitt, Esquire, Assistant Attorney General, Denver, Colorado.

This matter came on for trial to this District Court of three judges on June 30, 1965. The Court heard the evidence and argument of counsel and is now duly advised.

This is an action by the United States and The American National Red Cross, hereinafter referred to as "Red Cross", against the Department of Employment of the State of Colorado and its Executive Director, hereinafter referred to as the "Department".

The action seeks to have the Colorado Employment Security Act, Chapter 82 Colorado Revised Statutes 1953, [fol. 53] declared inapplicable to the Red Cross and seeks a refund of all sums collected under the Act from the Red Cross.

Briefly stated the contentions of the parties are as follows.

Plaintiffs contend that Red Cross is an instrumentality of the United States, and as such is immune from taxation by Colorado, and Congress has not waived that immunity.

Defendants contend that the Red Cross is not an instrumentality of the United States and in any event, Congress has, by the 1960 amendments to the Federal Unemployment Tax Act, waived whatever immunity Red Cross had with respect to the application of the Colorado Employment Security Act.

The issues as set forth in the pre-trial order are as follows:

1. Whether Red Cross and its chapters are instrumentality or instrumentalities or agency or agencies of the United States.

2. Whether Congress by the 1960 amendments to the Federal Unemployment Tax Act has waived Red Cross' constitutional immunity from the application of the Colorado Employment Security Act.

3. Whether the chapters in Colorado of The American National Red Cross are each juridical entities separate and apart from each other and from plaintiff, The American National Red Cross.

4. Whether plaintiff is precluded from obtaining relief in this Court because it has not brought suit in the District Court for the City and County of Denver [fol. 54] as provided for in Section 82-9-9 of the Act.

5. Whether Red Cross is entitled to interest on any refunds which may be granted by this Court.

There is little dispute as to the facts. The pre-trial order contains the following statement of uncontroverted facts:

1. Plaintiff The American National Red Cross (hereinafter sometimes referred to as "Red Cross") is organized and exists by virtue of an act of the Congress of the United States of America (Title 36 USC Sec. 1 et seq.) which provides that it is a body corporate and politic in the District of Columbia. Red Cross does not have its principal place of business in the State of Colorado.

2. The United States of America is a corporate sovereign and body politic.

3. Defendant Department of Employment (hereinafter sometimes referred to as "Department") is an agency of the State of Colorado, charged with the function of administering the Employment Security Act of the State of Colorado (Colorado Revised Statutes 1953, as amended, Chapter 82) hereinafter referred to as the "Act".

4. Defendant Bernard E. Teets is the Executive Director of Employment and as such is head of the Department.

5. The Department determined that employment in Colorado was subject to the Act and demanded that payment by Red Cross and certain of its chapters [fol. 55] be made of the contributions and interest provided for by the Act.

6. Thereafter and prior to the commencement of this action, payments aggregating more than $10,000 were made involuntarily and under protest to defendants. Part of said payments was forwarded from the office of The American National Red Cross in Washington, D.C. and parts were forwarded from the offices of various Red Cross chapters located in Colorado. The parts forwarded by any one such office did not aggregate $10,000.

7. Each of said payments was accompanied by an application for refund, each of which was denied by defendants prior to the commencement of this action.

8. The American National Red Cross is a charitable organization described in 26 USC Section 501(c)(3) and exempt from United States Income Tax under Title 26 USC Section 501(a).

9. Defendants claim that if Red Cross does not make payments which they claim continue to become due under the Act, Red Cross will be subject to the penalties, interest charges and remedies for collection of contributions, interest and penalties provided for by the Act.

10. Colorado Law does not provide for interest with respect to refunded contributions under the Act.

In addition, it was admitted by the defendants at the trial that the local chapters of the Red Cross have no legal entity apart from the plaintiff, The American National Red [fol. 56] Cross.

The Court incorporates in its findings of fact the foregoing uncontroverted facts and admission, and in addition thereto finds the following facts.

The Red Cross' charter designates it as the organization authorized to act in matters of relief under the Treaties of Geneva and to perform all duties devolved upon a national society by each nation which has acceded to any of said treaties or conventions.

In addition, it is authorized to act in matters of voluntary relief and as a medium of communication between the people of the United States and their armed forces.

By the provisions of Title 10 United States Code, § 2602, the President may accept the cooperation and assistance of the Red Cross and employ it under the armed forces under regulations to be prescribed by the Secretary of Defense, and pursuant to this statute the President has so utilized the Red Cross.

The Red Cross is the authorized agency for communication with prisoners of war held by unfriendly governments.

In addition to these services performed for and on behalf of the United States Government, the Red Cross is also authorized to and does carry on a system of national and international relief in time of peace and apply the same in mitigating the sufferings caused by pestilence, fire, famine, floods, and other great national calamities, and devise and carry on measures for preventing the same.

[fol. 57] Conclusions of Law

The Court concludes it has jurisdiction of the subject matter of this action and of the parties thereto.

The Court concludes that the local chapters of The American National Red Cross are not separate legal entities but are integral parts of the plaintiff The American National Red Cross.

The Court concludes that The American National Red Cross is an instrumentality of the United States, and as such is immune from taxation under the Colorado Employment Security Act, unless that immunity has been waived by the 1960 amendments to the Federal Unemployment Tax Act.

The Court concludes that the United States of America has a legal interest in this litigation and is a proper party plaintiff to this action.

The Court concludes that the 1960 amendments to the Federal Unemployment Tax Act do not waive the immunity of the Red Cross from taxation under the Colorado Employment Security Act.

The reasons for the Court's conclusions in the latter respect are as follows:

The Federal Unemployment Tax Act (Chapter 23 of Title 26 U.S.C.) imposes a federal tax upon employment to provide a fund for unemployment compensation. However, the act recognizes the right of the states to provide and administer a fund for the same purpose under state law, and the contributions made by employers to the state [fol. 58] fund are by the federal act made a credit against the federal tax (see §§ 3301 and 3302).

Although instrumentalities of the United States have a constitutional immunity from state taxation, § 3305(b) of the Federal Unemployment Tax Act waived that immunity as to some instrumentalities of the United States. Prior to the 1960 amendments to the Federal Unemployment Tax Act, § 3305(b) read in its essential parts as follows:

> "The legislature of any State may require any instrumentality of the United States (except such as are (1) wholly owned by the United States, or (2) exempt from the tax imposed by section 3301 by virtue of any other provision of law) . . ., to make contributions to an unemployment fund under a State unemployment compensation law . . .".

The Red Cross came within the provisions of the second exemption, being an instrumentality of the United States which was exempt from the tax imposed by § 3301 by virtue of § 3306(c) (8), which exempted from the taxes imposed by § 3301 service performed in the employ of a corporation organized and operated for charitable purposes.

However, by the 1960 amendments to the Federal Unemployment Tax Act, § 3305(b) was amended to read in its essential parts as follows:

> "The legislature of any State may require any instrumentality of the United States (other than an instrumentality to which section 3306(c) (6) applies . . . to make contributions to an unemployment fund under a State unemployment compensation law . . .".

In other words, the Congress did not waive the immunity from state taxes of instrumentalities of the United States to which § 3306(c) (6) applies.

§ 3306(c) (6), as amended by the 1960 amendments, "ap-
[fol. 59] plies" to an instrumentality of the United States which is

> "exempt from the tax imposed by section 3301 by virtue of any provision of law which *specifically refers to such section* . . .". (Emphasis added.)

Subdivision (8) of § 3306(c), as amended by the 1960 amendments, is a "provision of law" which exempts from the tax imposed by § 3301

> "service performed in the employ of a religious, charitable, educational, or other organization described in section 501(c) (3) which is exempt from income tax under section 501(a)".

Admittedly The American National Red Cross is such an exempt organization. There remains then only the question of whether or not subdivision (8) of § 3306(c) as amended in 1960 "specifically refers to" § 3301.

§ 3301 imposes a tax on employment. § 3306(c) (8) provides that the employment described in subdivision (8) is not employment for the purposes of the Federal Unemployment Tax Act. This is only another way of saying that the employment described in § 3306(c) (8) is exempt from the taxes imposed by § 3301.

The Court concludes that § 3306(c) (8) "specifically refers to" § 3301 and that the Red Cross is exempt not only from the taxes under the Federal Unemployment Tax Act but also is immune from taxation under the Colorado Employment Security Act.

That it was the intent of the Congress that the 1960 amendments should not subject the Red Cross to either State or Federal unemployment taxes is evident from the following quotation from the legislative history found at page 12797 of Volume 106, No. 115 of the Congressional [fol. 60] Record of Proceedings and Debates of the 86th Congress, Second Session, held on June 22, 1960, wherein Congressman Ikard, in clarification of the purposes of the 1960 amendments here under consideration, stated:

> "The American National Red Cross has for many purposes been regarded as an instrumentality of the Federal Government. However, its exemption from Federal unemployment taxes is presently based on that provision of the statute which specifically exempts service performed in the employ of certain charitable corporations from such taxes. H.R. 12580 continues the exemption from unemployment taxes for such charitable corporations; hence the bill is not intended to remove the Red Cross' current exemption. Similarly, it is not the intention of the bill to remove the present exemption of Red Cross employment from State unemployment taxation."

The Court concludes that the Red Cross is not precluded from obtaining relief in this court because it has not brought suit in the District Court for the City and County of Denver as provided in § 82-9-9, Colorado Revised Statutes 1953.

The Court concludes that the Red Cross is entitled to judgment against the defendants for the amounts which it and its various chapters have paid to the State of Colorado under the Colorado Employment Security Act, but the Red Cross is not entitled to recover any interest thereon.

It Is Ordered that this matter is continued for 10 days from this date for the filing of a stipulation of the parties as to the amount for which judgment should be entered. Upon the filing of the stipulation, the Clerk of the Court shall forthwith enter judgment in favor of The American National Red Cross and against the defendants in the amount stipulated.

[fol. 61] Dated at Denver, Colorado, this 8th day of September, 1965.

By the Court:

Oliver Seth, United States Circuit Judge;

Alfred A. Arraj, United States District Judge;

Hatfield Chilson, United States District Judge.

[fol. 62]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 8233

THE AMERICAN NATIONAL RED CROSS, Plaintiff,

vs.

DEPARTMENT OF EMPLOYMENT, and BERNARD E. TEETS, Executive Director of Employment of the Department of Employment, Defendants.

SUPPLEMENTAL CONCLUSIONS OF LAW AND JUDGMENT—
Filed September 16, 1965

It having been called to the Court's attention that the conclusions of law entered by the Court on September 8, 1965, concluded that The American National Red Cross was entitled to a judgment against the defendants for the amounts which it and its various chapters have paid to

the State of Colorado under the Colorado Employment Security Act, but the Court made no determination as to the prayer for injunctive relief.

The Court therefore makes the following supplemental conclusions of law, to-wit:

The Court concludes that the Red Cross is entitled to a permanent injunction enjoining the defendants and their officers, agents, servants, employees, and attorneys from assessing or collecting any contributions, interest, or penalties under the Employment Security Act of the State of Colorado, Chapter 82 of the Colorado Revised Statutes 1953, as amended, against or from the plaintiff, The American National Red Cross.

It Is Therefore Ordered, Adjudged and Decreed that the [fol. 63] defendants, Department of Employment and Bernard E. Teets, Executive Director of Employment of the Department of Employment, and their officers, agents, servants, employees, and attorneys are permanently enjoined from assessing or collecting any contributions, interest, or penalties against or from the plaintiff, The American National Red Cross, under the Employment Security Act of the State of Colorado, Chapter 82 of the Colorado Revised Statutes 1953, as amended.

It Is Further Ordered, Adjudged and Decreed that the plaintiff, The American National Red Cross, have judgment against the defendants in the sum of $27,927.79 and the plaintiff's costs to be taxed by the Clerk of the Court.

Dated at Denver, Colorado, this 15th day of September, 1965.

By the Court:

Oliver Seth, United States Circuit Judge;

Alfred A. Arraj, United States District Judge;

Hatfield Chilson, United States District Judge.

[fol. 64]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 8233

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed November 15, 1965

I. Notice is hereby given that the Department of Employment and Bernard E. Teets, Executive Director of Employment of the Department of Employment, the defendants above-named, hereby appeal to the Supreme Court of the United States from the final order of this Court granting a permanent injunction and entering a judgment against the defendants in accordance with the complaint of the plaintiff, entered in this action on September 15, 1965.

This appeal is taken pursuant to 28 U.S.C. Sec. 1253.

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Complaint of the American National Red Cross and the United States of America, filed October 7, 1963.

2. Defendants Motion to Strike and Dismiss and Memorandum in support thereof, which were filed on October 28, 1963, and November 6, 1963.

[fol. 65] 3. Plaintiff's Motion for Summary Judgment and Affidavit in support thereof, filed November 21, 1963.

4. Plaintiff's Memorandum in support of their Motion for Summary Judgment, filed December 9, 1963.

5. Defendants' Memorandum Brief in opposition to Plaintiff's Motion for Summary Judgment, filed December 24, 1963.

6. Plaintiffs' Reply Brief, filed January 10, 1964.
7. Courts Order on Motions dated March 4, 1964.
8. Defendants' Answer filed March 26, 1964.
9. Defendants' Pre-Trial Statement, filed July 28, 1964.
10. Plaintiffs' Pre-Trial Statement, filed July 29, 1964.
11. Pre-Trial Order dated July 31, 1964, and filed July 31, 1964.
12. Transcript of Testimony of Proceedings including closing legal arguments of Plaintiffs' and Defendants' counsel.
13. Courts Findings of Facts and Conclusions of Law, filed September 8, 1965 and dated September 8, 1965.
14. Courts Supplemental Conclusions of Law and Judgment dated September 15, 1965 and filed September 16, 1965.

III. The following questions are presented by this appeal:

I.

Whether the Plaintiff, American National Red Cross and its Chapters are instrumentalities and agencies of the United States Government.

II.

Whether the United States Congress by its 1960 Amendments to the Federal Unemployment Tax Act (Title 26, U.S.C.; Section 3305) has waived the constitutional immunity of the Plaintiff American National Red Cross from the application of the Colorado Employment Security Act, Chapter 82, 1963, Colorado Revised Statutes.

[fol. 66]

III.

Whether the Plaintiff, American National Red Cross is precluded from obtaining relief in this Court because it

failed to bring suit in the District Court of the City and County of Denver, State of Colorado, as provided for in Section 82-9-9, of the Colorado Employment Security Act, 1963, Colorado Revised Statutes and therefore, whether this Court had jurisdiction over the subject matter or the Defendants to this action.

IV.

Whether the United States of America is a real party in interest to this action and should have been dismissed as a party plaintiff to this action.

V.

Whether this Court had jurisdiction over the Defendants Department of Employment and Bernard E. Teets, Executive Director of Employment of the Department of Employment.

Duke W. Dunbar, Attorney General; Frank E. Hickey, Deputy Attorney General; James D. McKevitt, Assistant Attorney General, By James D. McKevitt, Assistant Attorney General, 1210 Sherman Street, Denver, Colorado 80202, 222-1551.

[fol. 67] Proof of Service (omitted in printing).

[fol. 118]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action 8233

THE AMERICAN NATIONAL RED CROSS, Plaintiff,

v.

DEPARTMENT OF EMPLOYMENT, and BERNARD E. TEETS, Executive Director of Employment of the Department of Employment, Defendants.

OFFICIAL TRANSCRIPT OF TESTIMONY OF JANUARY 7, 1966

Proceedings before the Honorable Oliver Seth, United States Circuit Judge, presiding, the Honorable Alfred A. Arraj, United States District Judge, and the Honorable Hatfield Chilson, United States District Judge, beginning at 9:00 o'clock a.m., on the 30th day of June, 1965, in Courtroom A, Main Post Office Building, Denver, Colorado.

APPEARANCES:

For the Plaintiff: William Massar, Department of Justice, Washington, D. C., John L. Currin, General Counsellor's Office of The American National Red Cross, Washington, D. C., and Jack D. Henderson, Attorney at Law, Denver, Colorado.

For the Defendants: James D. McKevitt, Assistant Attorney General, Denver, Colorado.

[fol. 120] Proceedings

The Court: Are the parties ready in 8233?

Mr. Massar: Yes, Your Honor.

Mr. McKevitt: Yes, Your Honor.
The Court: We will proceed.

OPENING STATEMENT OF MR. MASSAR

Mr. Massar: As Your Honors will recall, this is an action by the Red Cross and the United States for judgment declaring that the Colorado Unemployment Security Tax is unconstitutional in its application to the Red Cross and for an injunction enjoining the application of the Act to the Red Cross and for refund of such contributions under the Act as have to the time of judgment been paid to the defendants by the Red Cross.

The issues that remain in the case as appears from the pretrial order are these:

Whether the Red Cross and its chapters are instrumentalities or agencies of the United States;

And, whether Congress by the 1960 amendments to the Federal Unemployment Tax Act has waived Red Cross' constitutional immunity from the application of the Colorado Employment Security Act;

Whether the chapters in Colorado of the American National Red Cross are each juridical entities separate and apart from each other and from plaintiff, the American National Red Cross.

[fol. 121] In addition to those issues, the pretrial order also reserves the issue of whether plaintiffs are precluded from obtaining relief because suit was not previously brought in the District Court for the City and County of Denver in accordance with the procedure outlined in the Colorado Employment Security Act, and the ultimate question, if there be recovery by the Red Cross whether it is entitled to interest on the payments that have been made.

When the parties were previously before the Court, it was urged that fundamentally the issues involved here are

pure questions of law, and it was argued that perhaps this Court dispose of the issues without a trial.

This Court has ruled that there should be a trial and the plaintiffs are now prepared to offer evidence through witnesses and through documents to support their contention that the American National Red Cross is an instrumentality of the United States and as such immune from the application of the Colorado Unemployment Security Act.

The live evidence, the evidence through witnesses, will focus on the statutory and treaty obligations imposed upon the Red Cross, which in turn it will be urged are what clearly makes the American National Red Cross an instrumentality of the Government rather than an ordinary charitable organization.

Reference will also be made to other statutes, statutes [fol. 122] other than those with which the witnesses will be concerned in their testimony.

The Court will be asked to receive in evidence and take judicial notice of the various rulings, proclamations and other material which will show what the legislative branch and the executive branch of the United States as well as the various states have concluded as to the status of the American National Red Cross, both with respect to its immunity from taxation and its immunity from other regulatory measures by the various states.

I would like to proceed by calling the first witness, Mr. Raymund Yingling.

Mr. McKevitt: I would like to make an opening statement, if I could, Your Honor.

The Court: Yes.

OPENING STATEMENT OF MR. MCKEVITT

Mr. McKevitt: If Your Honor please, counsel has expressed the issues as set forth in the pretrial order, and with these issues counsel for the defense has no objection.

These are basically the issues, and I would like to elaborate on them further.

First of all, this action arises because of two statutes in question, namely Chapter 82 of the Colorado Revised Statutes, 1963, the Colorado Unemployment Security Act, and then the Federal Employment Tax Act, commencing in Title 26, Section 3301.

[fol. 123] As Your Honors are well aware, from past arguments, the issue has arisen from the efforts by the State of Colorado to subject the American National Red Cross to coverage under the Colorado Employment Security Act.

Basically, our position will be this, Your Honors, that the Federal Government does two things. One, it requires minimum standards of those who will be covered as subject employers throughout the United States, and, in addition thereto, it also allows the states to make additional coverages of employers which the Federal Government may not cover themselves.

We submit, by the 1960 amendments, the Government has allowed the State of Colorado as well as the State of Alaska and State of Hawaii, who cover nonprofit organizations, to tax organizations such as American National Red Cross.

This is, Your Honors, a test case, Hawaii deciding it is exempt and Alaska and Colorado deciding it is subject to the acts, and this being selected as the jurisdiction to decide the status and the exemption, if any.

We submit the issues are, one, whether or not they are an instrumentality, which we deny. Our second contention is whether or not, if the Court finds that they are an instrumentality or agency of the United States Government, if the Congress and United States has allowed the State of Colorado to still tax the American National Red Cross, [fol. 124] which we submit they have in the alternative.

Another important question is the question of chapters throughout the State of Colorado, as to whether or not they are separate legal entities or whether they are all

one and in fact they are all part of one entity of the American National Red Cross headquartered in the District of Columbia.

It would be our position, having reviewed the charter and by-laws of the National Red Cross as well as their modus operandi, that they are one entity, and in the event this Court finds the American National Red Cross is subject to the Colorado Employment Security Act, that in that event all employees within all chapters within the State of Colorado are covered under the Colorado Employment Security Act. In other words, it would not be chapters having four or more employees, because it would be a matter of all the chapters since the chapters would be one entity, and for such reason we submit this to the Court as well.

Mr. Henderson has asked me to make certain agreements and stipulations, one of which is in the event the Court were to find that the American National Red Cross were entitled to a refund of taxes paid that the figure would be left open subject to a computation by the Colorado Department of Employment, and we will gladly cooperate and agree to furnish that at the time in question.

[fol. 125] The last, in the event the Court finds it is entitled to a refund, is it also entitled to an interest thereon?

This we deny.

The next issue I would like to raise at this time, because I think it is important. Previously, this action was brought in the name of the United States of America and American National Red Cross. Subsequent thereto, there were various motions to dismiss and strike submitted by the defendants and a motion for summary judgment submitted by the plaintiff. As Your Honors are aware, you made an order dismissing the United States.

Previously the appearances made were by Jack Henderson and in the name of the United States Government by Mr. William Massar. We wish to make an inquiry

at this time and also object to an appearance as to the U.S. Department of Justice as a general appearance.

We would inquire, first of all, if their appearance if that of general appearance or amicus curiae so that we may submit further argument on the role of amicus curiae, and, secondly, whether or not they are entitled in the first place, because it is obvious we have a plaintiff and the sole plaintiff has private and public counsel before this Court.

We know this is within the discretion of the Court, but we do raise the inquiry and would object to the appearance of Mr. Massar as the general counsel or in making a general [fol. 126] appearance on behalf of the American National Red Cross.

The Court: The Court, for the purpose of this hearing and at least until the motion for rehearing is disposed of, will consider the United States to be a party.

The matter I think was discussed at the pretrial and there was a reference made to a time for appeal by the United States, and it is my understanding that the intention was to carry the United States as a party until the motion for rehearing was disposed of, and I think procedurally it would be a little clearer if we consider them as a party here in the course of this hearing.

Mr. McKevitt: Thank you, Your Honor.

The Court: Now, counsel, as I understand you, referring to the pretrial order, on page 4, this Section 6, the issue remaining as subsection 3 is disposed of, that that is no longer a contested issue by reason of your statement.

Would you agree on that, counsel, that they are, all chapters of American Red Cross are one entity, or—

Mr. Massar: That has been our position throughout the case and we do not contend otherwise at this time.

The Court: That's no longer a contested issue, is that correct?

Mr. McKevitt: Yes, I would like one more clarification. That is, regardless of the number of employees, each chapter is one part of one legal entity, namely the Ameri- [fol. 127] can National Red Cross.

Mr. Massar: I would say yes.

Mr. McKevitt: Then that issue has been resolved, Your Honor.

The Court: All right, thank you. You may proceed with your first witness, counsel.

Mr. Massar: Call Mr. Yingling.

Raymund Thomas Yingling called as a witness by the plaintiffs, being first duly sworn, on his oath testified as follows:

Direct examination.

By Mr. Massar:

Q. Would you please state your full name and address.

A. Raymund Thomas Yingling, 3040 Idaho Avenue, Washington, D.C.

Q. What degrees do you hold and from what institutions?

A. I hold an A.B. from Western Maryland College, Maryland, and an LL.B. from Georgetown University Law School.

Q. And of what bars are you a member?

A. I am a member of the D.C. bar and of the Supreme Court bar.

Q. Could I ask you to please raise your voice a bit? Counsel may have some difficulty, because I am having—

A. All right, if you can't hear me—

Q. What is your occupation?

[fol. 128] A. I am employed by the State Department. My title there is Assistant Legal Advisor.

Q. What are the nature of your duties in that capacity?

A. I have responsibility for legal questions relating to a number of functional problems, among which are the Geneva Conventions of 1949.

Q. Would you briefly state what the Geneva Conventions of 1949 are?

A. Well, these are four conventions, that is treaties between governments, which as the date indicates were negotiated at Geneva in 1949 in a diplomatic conference which represented the most of the then states of the world, I think 50 some states present at that time.

These conventions have as their general purpose the protection of victims of war. The first relates to the amelioration of wounded and sick in armed forces in the field; second, amelioration of wounded and sick and shipwrecked of armed forces at sea; third, prisoners of war; and, fourth, the protection of civilians at wartime.

Q. Have you represented anyone at these?

A. Yes, I was the vice chairman of the delegation that negotiated these four conventions in 1949.

Q. Did you take part in the United States' positions for the 1949 conference?

A. Yes, I represented the State Department on an [fol. 129] interdepartmental committee which prepared the U.S. positions. I don't recall all the departments that were on that. The Department of Defense, of course, State Department, the Department of Justice, American Red Cross.

Q. Have you written on the subject of the Geneva Conventions in 1949?

A. Yes, I collaborated on an article on these conventions, which was published sometime after the 1949 conference.

Q. How long have you been with the Department of State altogether?

A. Forty some odd years.

Q. And how long have you been handling problems related to the Geneva Conventions?

A. Since 1948.

Q. Were you present at the signing of what is commonly referred to as the First Geneva Convention of 1949?

A. Well, I was not only present, I signed it.

Q. Has that convention been ratified by the United States and is it now a valid and existing treaty to which the United States is a party?

A. It is.

Q. Is the First Geneva Convention of 1949 published in Volume 6 of the United States Treaties and Other International Agreements, at page 3114 and following?

A. It is published in that series, and I think that's [fol. 130] the page.

Mr. Massar: I now ask the Court to take judicial notice of the First Geneva Convention of 1949, the publication of the United States Treaties and Other International Agreements, as made evidence of the treaties under the Act of September 23, 1950, Chapter 1001, Section 2, as appears in 64 Statutes at Large 939 and 979, and in Title 1, United States Code, Section 112(a).

Mr. McKevitt: What was the Title, counsel?

Mr. Massar: Title of the Code?

Mr. McKevitt: Right.

Mr. Massar: 1, United States Code, Section 112(a). That's the section of the Code which makes the United States Treaties and Other International Agreements evidence of the treaties themselves.

Q. Mr. Yingling, is the instrument which I now hand you a true and correct copy of the First Geneva Convention of 1949?

A. Yes, it is.

Mr. Massar: I would like at this time to hand up three copies of the First Geneva Convention, a copy of which has already been furnished counsel for the State, so that the Court may have them for their convenience.

The Court: I think it will clarify these if the Clerk will number them in some way. I realize they are not strictly exhibits.

[fol. 131] Mr. Massar: Fine, shall we make any differentiation in the numbering as between exhibits in evidence?

The Court: No, it won't be necessary.

(Plaintiffs' Exhibit 1 was marked for identification.)

By Mr. Massar:

Q. Mr. Yingling, what does Article 24 of the First Geneva Convention provide?

A. That article brings under the protection of the Convention the medical personnel and chaplains of the armed services.

Q. What is the effect of Article 26 of the First Geneva Convention of 1949?

A. Article 26 extends the same protection to personnel of National Red Cross Societies or other voluntary aid organizations which are authorized and accepted by governments to assist them in caring for the sick and wounded in accordance with the terms of the Convention.

Q. Was it contemplated by the United States delegation when Article 26 was agreed upon that a voluntary society would be recognized and authorized by our government to render assistance to the regular medical service of our armed forces?

A. It was.

Q. Did the United States delegation have any particular society in mind?

A. It did.

Q. Has Congress recognized and authorized any society? [fol. 132] A. Well, the society which we had in mind was the American National Red Cross.

Q. And has Congress recognized and authorized any society since then to render assistance to the regular medical service of the armed forces of the United States?

Mr. McKevitt: I will object. I think this calls for a conclusion beyond the testimony he is giving to the particular treaty itself. Also, the record would speak for itself.

The Court: I think the statutory reference is sufficient on that point, counsel.

Mr. Massar: I would ask the Court to take judicial notice at this time of an act to incorporate the American National Red Cross, approved January 5, 1905, which appears in Volume 33, Statutes at Large of the United States of

America, at pages 599 and following, and further to take judicial notice of that act as now amended, which consists of Sections 1 through 9 of Chapter 1 of Title 36 of the United States Code, 1958 Edition.

And at this time, I would like to read from that act, which in Section 3, provides:

"The purposes of this corporation are, and it shall be, to furnish volunteer aid to the sick and wounded of armed forces in time of war, in accordance with the spirit and conditions of the Conference of Geneva of October, 1863, [fol. 133] and also the Treaties of the Red Cross or the Treaties of Geneva of August 22nd, 1864 and July 27th, 1929."

The Court: Counsel, we will take notice of the statute and we will read it, so you can proceed with your witness, if you would.

Mr. Massar: I take it that it will be unnecessary for counsel to reserve any exceptions to any rulings of the Court?

The Court: Yes.

By Mr. Massar:

Q. Mr. Yingling, why do you conclude that the—I will withdraw that question. Mr. Yingling, in your opinion, has the American National Red Cross, or does the American National Red Cross constitute an instrumentality by which the United States discharges its obligations under Article 26 of the First Geneva Convention of 1949?

Mr. McKevitt: Objection, Your Honor. I object on the grounds this is a conclusion to be drawn by the Court and a legal question per se.

The Court: I think it is basically a fact question. The objection will be overruled. He is not asking a legal question. Proceed.

A. Counsel, would you please repeat just the last part of the question?

By Mr. Massar:

Q. Would you state whether, in your opinion, the American National Red Cross is an instrumentality of the United [fol. 134] States by which it discharges its treaty obligations under Article 26 of the First Geneva Convention of 1949.

A. It is my opinion that it is.

Q. Would you state why it is your opinion.

A. Well, the statute clearly indicates, in my view, both in what is said in the Preamble and in Section 3, which states the primary purpose of creating this organization and reincorporating it in 1905 was to care for the sick and wounded of armed forces under these Conventions to which the United States was a party and to do all of the things which a national Red Cross society was authorized to do under those Conventions.

Mr. McKevitt: Now, Your Honor, I would like to move once again to strike the question and also the answer, inasmuch as the opinion of the witness has been based upon a statute and statute only, from which I think this is a conclusion to be drawn by the Court.

The Court: That may very well be, but the objection is overruled.

By Mr. Massar:

Q. Are there any other provisions of Chapter 1 of Title 36, which in your judgment support the conclusion that the American National Red Cross is an instrumentality through which the United States has chosen to discharge its treaty obligations under the First Geneva Convention of 1949?

[fol. 135] A. Well, in the Preamble of the 1905 Act, which reincorporated the Society, it was indicated the purpose was to put this Society—which the Congress considered so important that it ought to be under Government supervision—to put it under Government supervision, and not only is the purpose of Section 3 as I have already indi-

cated, but Section 5 makes the Government a participant in this organization by authorizing the President to name any of the 50 Board of Governors, and one of these must be the Chairman of the organization and seven others must represent different Federal departments and agencies.

Also, in Section 6, I think it is, of the same Act, Congress provided that the Society must make an annual report to the Secretary of Defense, which would contain its receipts and disbursements, among other things, which the Secretary of Defense would audit, and then the Secretary of Defense would pass this report on to the Congress.

It seems to me all these things indicate that Congress had in mind using this organization, setting up this organization and using it, to carry out duties and obligations which are placed on parties to the Geneva Convention of 1949, the first treaty convention.

Mr. McKevitt: For the record, I would submit the same objection and move this answer be stricken on the ground previously tendered to the Court.

[fol. 136] The Court: Overruled, proceed.

By Mr. Massar:

Q. In your opinion, Mr. Yingling, do Sections 13 and 15 of Title 36, which provide for the use by the American National Red Cross of land and buildings belonging to the Government for their national headquarters in Washington, support your conclusion that the American National Red Cross is an instrumentality of the Government, by which it has chosen to discharge its treaty obligations under the First Geneva Convention of 1949?

A. I think this supports the other conclusions I have reached.

Mr. McKevitt: For the record, I would move the answer and question be stricken on the ground previously tendered.

The Court: Overruled.

By Mr. Massar:

Q. Are you familiar with Public Law 131 of the 83rd Congress, First Session, which appears in Title 10, Section 2602, of the United States Code, 1964 Edition, and which deals with the tender—

A. Yes, that statute authorizes the Secretary of Defense to—I mean, authorizes the Chairman of the American National Red Cross to tender the services of the organization to the Department of Defense, and I think in 1951 the then Chairman, Harriman, did tender them and they were accepted by President Eisenhower in 1953.

[fol. 137] Mr. Massar: I now ask the Court to take judicial notice of Public Law 131, 83rd Congress, First Session, which appears in Volume 57, Statutes at Large, at page 178, and which also appears in Section 2602 of Title 10 of the United States Code, 1964 Edition, and I offer in evidence at this time a copy of the letter dated July 17, 1953, from Roland D. Harriman, Chairman of the American National Red Cross, to the President of the United States.

The Court: Is this the letter that is referred to in the pretrial list?

Mr. Massar: Yes.

Mr. McKevitt: So far as authenticity is concerned, Your Honor.

The Court: Yes.

Mr. McKevitt: I have objection on other grounds.

The Court: What is the basis of your objection?

Mr. McKevitt: I would like to cite these authorities to the Court, Your Honor.

My first objection would be based on the ground the document is hearsay. The party is not here to be examined so far as statements are concerned.

My next objection is that this is addressed to a third party and has no relation to correspondence between the parties to this action.

My next objection would be based on the fact that the [fol. 138] document is unsigned.

For these authorities, I would like to cite the following cases—

The Court: Well, the fact it is unsigned, isn't that covered by your authenticity agreement?

Mr. McKevitt: All right, Your Honor, I will withdraw that.

My other two objections would be on the basis of hearsay and the fact that this party is not here for cross-examination and the third party rule, and I would like to cite cases to the Court on that.

One case I would cite is Gilbert vs. Gulf Oil Corporation, Court of Appeals of Virginia, 175 Fed. 2nd 705, wherein this report discusses several questions, one as to opinions and conclusions, one as to the question of the fact that the document without the right of cross-examination was questionable as to its entry.

Another case I would like to cite is Bella Steamship Company vs. Insurance Company of North America, Court of Appeals, Maryland, a case cited in 5 Fed. 2nd 570. It held that the document was inadmissible where it was addressed to a third person with whom the adverse party was in no wise connected.

Those are the authorities which I would submit at this time, Your Honor.

[fol. 139] The Court: What is the purpose of the offer, counsel?

Mr. Massar: The purpose of the offer is to establish that the President of the United States has accepted the tender of cooperation and assistance provided for by Section 2602 of Title 10, and I believe the document is admissible in evidence on the ground that it is an official document.

This is addressed to the President of the United States and now reposes in the Archives of the United States, and the authenticity of the document, proof of authenticity of the document, has been waived by the State.

On this ground, I submit that the document is relevant and admissible in evidence.

Mr. McKevitt: May I make one more statement to the Court, Your Honor?

The Court: Yes, surely.

Mr. McKevitt: In light of counsel's statement and justification for admissibility, I would like to object on the ground this is irrelevant because what he is stating now is here is a case where the American Red Cross has tendered its services and where the United States Government has accepted services.

The statute has already provided the tender and acceptance may be made, and this is just supplemental to [fol. 140] that and has no bearing on the matter.

The Court: It will be received in evidence.

(Plaintiffs' Exhibit 2 for identification was received in evidence.)

Mr. Massar: I now offer in evidence a copy of a letter dated August 17, 1953, from President Dwight D. Eisenhower, to Mr. Harriman, Chairman of the American National Red Cross.

The Court: Were these identified by numbers somewhere, counsel, for the record?

Mr. Massar: This will be Exhibit 3 in evidence.

The Court: What is the purpose of this letter?

Mr. Massar: To show the acceptance by the President of the United States of the tender by the American National Red Cross.

Mr. McKevitt: I would make the same objection and incorporate the authorities I have previously cited to the Court.

The Court: All right, thank you.

Mr. Massar: I would hand these copies up.

The Court: This Exhibit 3 will be admitted. Proceed.

(Plaintiffs' Exihibt 3 for identification was received in evidence.)

Mr. Massar: If the Court would find it convenient to [fol. 141] have these copies of Exhibits 2 and 3, I would hand them up at this time for that purpose.

The Court: Very well.

By Mr. Massar:

Q. Mr. Yingling, has the Congress of the United States recognized or authorized any voluntary society other than the American National Red Cross to render assistance to the regular medical service of our armed forces as contemplated by Article 26 of the First Geneva Convention of 1949?

Mr. McKevitt: Objection, on the ground I made on the other objections.

I think this is once again where counsel is asking the witness to comment on acts of Congress, which I think stand on their face as to what the provisions there are.

The Court: He is asking him whether an act exists. I think his question is proper.

A. No, there is no other society designated by Congress.

By Mr. Massar:

Q. Mr. Yingling, assuming that the notification required by Article 26 of the First Geneva Convention of 1949 has been given, would American National Red Cross personnel engaged in time of actual war with a foreign power in nursing or welfare activities in military hospitals or medical units be entitled in your opinion to the protection provided for by the First Geneva Convention of 1949?

[fol. 142] A. They would.

Q. In the same circumstances, would your answer be the same with respect to American National Red Cross personnel engaged, first, in nonmedical administrative activity in military medical facilities, and, secondly, in driving ambulances, searching for, collecting and transporting wounded and sick military personnel?

Mr. McKevitt: I'm going to object and ask the last question and answer be stricken, the previous question and answer and the last question, because now he is asking once again as to the contents of the Geneva Treaty part of the statutes, which speak for themselves.

The Court: Counsel, I think you are using the witness to present a legal argument, basically it's what you are doing.

The witness is qualified to interpret, I suppose, the purpose of the Geneva Conventions and their application, but if you could be a little more specific in your questions and if you would avoid any questions that are purely legal questions—you are just encumbering the record with legal argument for the most part.

This witness is an expert in his field, and if you would limit your questions to that scope, we will take judicial knowledge of all the statutes and all you will need to do is refer us to them and that will be sufficient. We will [fol. 143] interpret the statutes as best we can.

You may answer this question, but if you will be guided by that, it will be sufficient.

Would you read the question?

(The reporter read the pending question aloud.)

A. My answer would be the same.

By Mr. Massar:

Q. My last question of the witness, and I hope it comes within the Court's admonition, in carrying out these activities, Mr. Yingling, would the American National Red Cross be discharging obligations assumed by the United States under the convention?

A. Yes.

Mr. Massar: That's all.

Mr. McKevitt: Counsel, do you want to leave your papers up there?

Mr. Massar: They are not confidential, but I will give you some room.

Mr. McKevitt: Whatever is your pleasure.

Mr. Massar: I am sorry, I should have been more thoughtful.

Cross examination.

By Mr. McKevitt:

Q. Mr. Yingling, you say you are an Assistant Legal Advisor for the Department of State, United States Government?

A. That's correct.

[fol. 144] Q. How many are there?

A. I don't know exactly, but maybe an odd dozen.

Q. Pardon?

A. Maybe an odd dozen. I don't know exactly.

Q. Didn't you tell me yesterday there were approximately 64?

A. No, I told you the number fluctuates. There are about 65 lawyers in the Legal Advisor's office. I didn't tell you there were that many assistants.

Q. You have a particular specialty within the Department of State, do you not?

A. A particular specialty?

Q. Yes.

A. No, I have more than one legal subject for which I am responsible.

Q. All right, how many are there?

A. Well, I handle law of the sea questions. That's one. I handle sovereign immunity legal problems. I handle the Geneva Conventions of 1949. I handle some questions that relate to treaty exemption of persons from selective service. Those are the principal things that I handle.

Q. It is primarily limited to that scope?

A. I say those are the principal things.

Q. Is your activity as far as the Red Cross is concerned

limited to their use or their function under the Geneva Treaty?

[fol. 145] A. I wouldn't say that it is limited. My functions are not spelled out with any such precision as that. I would say that any question that involved the Red Cross that came to the Department, on which legal advice was needed, might be referred to me. Primarily, the legal questions relate, of course, to the Geneva Conventions and their interpretation.

Q. Well, let's go from your past experience. From past experience, has it not been limited, so far as your operation of the Red Cross is concerned, to the Geneva Treaty?

A. Largely, my Red Cross work has been a negotiation and interpretation of these conventions, yes.

Q. Any other work?

A. Well, counsellor, I am trying to be helpful, but I can't confine myself to saying I have never handled anything else related to the Red Cross than these things. I may have.

Q. None you can remember at the present time?

A. That's right.

Q. Is your position appointive or Civil Service or what?

A. Well, I have Civil Service status, because I was promoted into my present position from a classified Civil Service status. I understand I took that with me. I have never had to test that.

Q. Is it not correct that the—strike that. You are familiar also with the International Red Cross, are you [fol. 146] not, Mr. Yingling?

A. I don't know what you mean by that. You mean the International Committee of the Red Cross or the whole International Red Cross world?

Q. Would you be kind enough to explain both to the Court?

A. Yes, the International Red Cross world is composed of three sections.

Number one is the—not necessarily in this order—is the International Committee of the Red Cross, which sits in Geneva and is a private corporation under Swiss law, composed entirely of Swiss citizens, and it has the same humanitarian aims as all of the Red Cross world.

The second is the League of Red Cross Societies, which is a coordinating body in relief work and does relief work itself.

The third are these national societies, such as the American National Red Cross, which are found in countries which are parties to the Geneva Conventions of 1949 and prior conventions.

Q. Now, what are these national societies called when they are grouped together?

A. These national societies?

Q. If you refer to them as one body, what would you call them?

[fol. 147] A. You mean the whole Red Cross world?

Q. The various national societies.

A. The various national societies, so far as I am aware, are not grouped together.

Q. Is it not correct they have certain obligations they must conform to before they are or may be considered as a body of the International Red Cross?

A. Yes, the International Red Cross Conference, which is the governing body of the Red Cross world and normally meets about once every four years, is composed of delegates from national societies, the International Committee, the League and from governments which are parties to the Geneva Conventions, and this International Conference is the governing body of the Red Cross world and they have laid down some criteria for national Red Cross societies.

Q. Is it not correct one of these is as follows: "Be an institution whose autonomous status allows it to operate in conformity with the fundamental principles of the Red Cross as formulated by the International Red Cross Conference"?

A. Yes.

Q. Is that provision still in effect?

A. Yes, I think so.

Q. And it was so adopted by the International Red Cross Conference in 1948, was it not, Mr. Yingling?

A. I don't recall when it—specifically when it was [fol. 148] adopted, but it is still in force. I think it was approved by the last conference, which was the 19th. I may be wrong.

Q. Is it not correct that the formation of these various National Red Cross societies was for basically humanitarian purposes so far as the functions of the Geneva Treaties is concerned?

A. The whole purpose of the Geneva Treaties is humanitarian.

Q. So far as humanitarian purposes, one was to take care of soldiers wounded in the war?

A. That's one of the purposes.

Q. Is it not correct these societies were obligated or expected to give medical aid to soldiers who were wounded regardless of their alignment with any particular army or alliance?

A. Well, the convention so provides their function is to care for sick and wounded of armed forces in the field without regard to race or nationality or sex or what. I mean, they find sick and wounded people. Their function is the humanitarian function of taking care of them. That's the purpose they were set up for and the purpose for which the Geneva Conventions were entered into.

Q. Take, for example, a hypothetical example, in World War II, is it not correct, if the treaty were in effect at that time the American National Red Cross could take care of, [fol. 149] and would be expected to, German soldiers who were not yet prisoners but who were wounded?

A. If they found them on the battlefield, certainly. That's one of the purposes, to take care of them, gather them up and send them to hospitals and do whatever they can to ameliorate their condition.

Q. Is it also not correct that these various national societies were banded for an international humanitarian purpose rather than a national goal?

A. It is a humanitarian purpose. Yes. I mean, there is no distinction, I take it, about humanitarian principles on national grounds.

Q. That's what I say. I say it is not limited to national grounds. It is the international scope.

A. I will be glad to try to answer your question. I don't quite get the thrust of it. The conventions have as their purpose the taking care of victims of war, and the national societies have been set up by governments to assist the governments in carrying out those functions, those duties in fact and obligations under the conventions, and those duties and obligations are all humanitarian. These conventions have no other purpose.

Q. But the purposes are not national in scope. They are for world humanitarianism, isn't that correct?

A. As I say, I don't think of humanitarianism on [fol. 150] national grounds. When you speak of national grounds, I usually think of politics or national interests. These are interests of humanity and there is no difference in the care a sick and wounded man can get, no matter what country he belongs to or where he is from.

Q. You say you wrote a previous article on the Geneva Treaty?

A. Yes.

Q. Where is that located?

A. It is in the American Journal of the International Law. I am sorry, I can't give you an exact reference to it.

Q. You don't know the date of publication?

A. No.

Q. Do you have any idea?

A. I suspect it is several years after 1949, but I wouldn't know the exact year.

Q. Is it your opinion that the American National Red Cross is an agency of the United States Government?

A. It is.

Q. It is an agency and an instrumentality both then?

A. Well, counsel will have to define those terms, if he is going to make a distinction between them.

Q. Are you able to distinguish between them?

A. I might be able if I knew the context in which they were used. When I say an instrumentality or agency, it is [fol. 151] a corporation that is set up to assist the Government and assists the Government. You can put any terminology on that you wish. I am not using this in any technical or statutory sense.

Q. You are not referring to Title 26, United States Code, for example, or Title 10 or any other statutes, in other words?

A. You will have to be a little more exact in the reference to those titles.

Q. Are you referring to Title 26, relating to the Federal Unemployment Tax Act?

A. No, I am not. I said, I am not referring to these terms as used in any statutes.

Q. You are not referring, either, are you, to the Federal Disaster Act, Title 42?

A. No.

Q. Now, your opinion, you say, is based upon the wording of the statutes?

A. That they are an instrumentality?

Q. Right.

A. Yes, it is based on what is stated to be the purpose of the reincorporation of the society in the 1905 Act and the context in which that was made. The Preamble indicates what the Congress is trying to do in passing that act reincorporating the society.

Q. One of the prime reasons for forming your opinion, [fol. 152] is it not, is that the charter enables the President of the United States to appoint eight members to the Board of Governors, seven of which have a voting right?

A. No, my purpose in forming this opinion is to see

what this society is supposed to do, whether it is one of the societies that were referred to in the convention, in the First Geneva Convention. It is a national Red Cross society. They are so described in the convention.

Q. You recall your conversation with me yesterday afternoon, do you not?

A. Yes.

Q. Is it not correct that you told me that one of the reasons your opinion was so founded was on the fact that the President had a right to appoint seven voting members to the Board of Governors?

A. That this is an instrumentality?

Q. Right.

A. Not solely on that.

Q. No, I said, this is one of the reasons you gave.

A. Yes, I think this is all part of the picture. The whole 1905 statute, which reincorporated the society because the Congress thought its work was so important that it ought to be under Government supervision, all indicate what Congress was trying to do and whether it was trying to set up something to assist the Federal Government in [fol. 153] carrying out its obligations under the treaties.

Q. Now, you mentioned under the supervision of Congress. Is it under the supervision of the Congress?

A. Did I say under the supervision of Congress?

Q. Is the American National Red Cross under the supervision of Congress?

A. Wait a minute, let's get back to what I said. I thought I said under the supervision of the Government.

Q. I think you did. My apologies.

A. It is under the supervision of Congress only to the extent that the act provides that the annual report which it is required to make to the Secretary of Defense must be forwarded to the Congress.

Q. So far as the services are concerned under the Geneva Treaty, they are all done on a voluntary basis, are they not? There is a tender and an acceptance, a tender by

the American National Red Cross and an acceptance by the President of the United States?

A. That is not correct, yes.

Q. Pardon?

A. That is not correct. Under the convention, the Government has a right to ask the society to perform these functions and authorize them to perform these functions, and Congress set up the society to perform these functions.

Q. Does Congress not provide there would be a tender [fol. 154] and acceptance?

A. In my opinion, not in this part of the statute.

Q. What statute?

A. The 1905 Act. The Section 3 states the first purpose, as the primary purpose, of setting up the society and re-incorporating it was to assist in aiding the sick and wounded of the armed forces in the field in time of war.

Q. Well, Mr. Yingling, is there any way that the United States Government could force the American National Red Cross to tender its services if it did not offer same as required under the Geneva Treaty?

A. I think that if the Red Cross were authorized to perform these functions, and I can't understand—I mean, the practicality of this question—but, anyway, if the Red Cross were authorized to perform these functions in World War II, let's say, and did not perform them or refused to perform them, in my opinion they would be acting contrary to the intent of Congress in 1905 in setting up this corporation.

Q. Assuming they never offered to give the services, could they be forced to give the services?

A. As a practical matter, I think, yes. I don't know that that question has ever been raised or questioned.

Q. There is no provision for it in the treaties at this time?

[fol. 155] A. There is no provision for forcing them that I know of, no.

Mr. McKevitt: Thank you, Mr. Yingling.

Mr. Massar: I have no further questions of this witness.

Mr. McKevitt: I have no objection to the permanent excusal of Mr. Yingling. He is appearing from Washington, D.C., and if he has to catch an early plane I would have no objection to his departure at this time, Your Honor.

The Court: Thank you. He may be excused.

We will take a short recess.

(The Court recessed from 10:05 o'clock a.m. until 10:20 o'clock a.m.)

Mr. Massar: Mr. Jackson.

STEPHEN S. JACKSON called as a witness by the plaintiffs, being first duly sworn, on his oath testified as follows:

Direct examination.

By Mr. Massar:

Q. What is your full name?

A. Stephen S. Jackson.

Q. And your address?

A. 1400 South Joyce Street, Arlington, Virginia.

Q. What degrees do you hold and from what institutions?

A. I hold an A.B. degree from Holy Cross College, an [fol. 156] LL.B. degree from Harvard Law School, and an Honorary Doctorate degree of Laws from Catholic University of America.

Q. Of what bars are you a member?

A. I am a member of the New York State Bar, United States District Court for the Southern District of New York.

Q. Where are you presently employed and in what capacity?

A. I am employed in the Defense Department in the capacity of Special Assistant to the Assistant Secretary of Defense for Manpower.

Q. How long have you held that position?

A. This particular position I have held for three years.

Q. And what do the duties entail?

A. Well, my duties are prescribed by the Assistant Secretary of Defense, having to do with several areas concerning manpower and personnel. I have specific assignments as well as a responsibility to accept any assignment that the Secretary may require of me, the Assistant Secretary. I am referred to as the Senior Advisor.

Prior to my present assignment, I was the Deputy Assistant Secretary of Defense for Manpower. At the present time, our office is broken down into several areas, with eight deputies, and I am Special Assistant and where in any of those areas the Assistant Secretary wants my services [fol. 157] he will call upon me, whether it crosses any of these lines or not.

Q. And have the Department's relations with the Red Cross been delegated to you as a matter for your concern?

A. The Secretary of Defense has issued a directive covering this matter and ordered that the implementing action of the services be submitted to the Office of Assistant Secretary of Defense for Manpower. One of the special assignments I have under the Assistant Secretary of Defense for Manpower is to advise him or represent him in dealings with the National American Red Cross.

Q. And when you referred to implementation, were you referring to implementation of Public Law 131 of the 83rd Congress, First Session, which appears in Title 10, Section 2602, United States Code, of which the Court took judicial notice during Mr. Yingling's testimony?

A. That's right.

Q. You are familiar with that law, are you?

A. I am.

Q. Are you familiar with the tender and acceptance of assistance and cooperation under that law by Chairman Harriman of the Red Cross and President Eisenhower?

A. I am familiar with the documents referred to in the testimony given, yes.

Q. Have regulations contemplated by Section 2602 of [fol. 158] Title 10 been prescribed?

A. They have.

Q. I hand you four documents which have been marked for identification as Plaintiffs' Exhibits 4, 5, 6 and 7, and ask you whether these documents are true and correct copies of the implementing regulations which have been promulgated, to which you referred in answer to my last question?

A. They are.

Mr. Massar: I offer these documents in evidence, copies of which have been furnished to the State's counsel, and three copies of each of which I have here available for the Court's convenience.

The Court: Any objection?

Mr. McKevitt: May I have a second to read the documents, Your Honor?

The Court: Yes.

(Counsel perused documents.)

Mr. McKevitt: I would like to voir dire the witness.

Mr. Jackson, referring to Plaintiffs' Exhibits 4, 5, 6 and 7, which have been marked for identification purposes only, do you say you have personal knowledge of all the wording of these regulations?

The Witness: I didn't say all the wording, no, sir. I said I am familiar with them. There may be minutia to which [fol. 159] I couldn't swear to as my present knowledge.

Mr. McKevitt: Well, do you have personal knowledge as to whether or not these were the actual publications of various armed forces which are reflected on these exhibits?

The Witness: I have knowledge that they are issued in accordance with the original directive as prescribed by the Secretary. I didn't see them issued personally.

The Court: Counsel, were these within the pretrial order?

Mr. McKevitt: No, these have been submitted subsequent to the pretrial order, Your Honor. There is no stipulation as to authenticity as to these particular documents.

The Court: Don't they show on the face the authentication? You perhaps are not familiar—

Mr. McKevitt: No, I haven't seen yours, excuse me. If I may approach the bench, Your Honor?

(Documents were handed to counsel.)

The Court: Take your time. Go back and read them, if you like.

Mr. McKevitt: Thank you, Your Honor.

(Counsel perused documents.)

Mr. McKevitt: Your Honor, having reviewed the original documents and the certifications thereon, I have no further voir dire of the witness, and I have no objection as [fol. 160] to their admissibility.

If I may approach the bench, I will tender them back to the Court.

(Counsel handed documents to the Court.)

The Court: They will be admitted in evidence.

(Plaintiffs' Exhibits 4, 5, 6 and 7 were admitted in evidence.)

By Mr. Massar:

Q. Would you describe in summary form the logistical support which the armed services are authorized and directed to furnish the American National Red Cross under Section 2602 of Title 10 of the United States Code and the directives and regulations issued thereunder which have just been received in evidence as Exhibits 4, 5, 6 and 7?

The Court: Excuse me, counsel. The first part of the question is proper, but I don't believe it would be necessary for him to summarize the contents in answer to the first part of the question. The second part is not a proper question.

Would you read the first part?

The Reporter: "Would you describe in summary form the logistical support which the armed services are authorized and directed to furnish the American National Red Cross under Section 2602 of Title 10 of the United States Code and the directives and regulations issued thereunder which have just been received in evidence as Exhibits 4, 5, 6 and 7?"

[fol. 161] The Court: We don't want a summary of the regulations. If he will answer the first part of the question, it will be satisfactory.

By Mr. Massar:

Q. Would you confine yourself to what logistical support the armed services are authorized and directed to furnish the American National Red Cross under Section 2602?

A. Well, there are about a dozen of them listed and prescribed in the regulations. They deal with transportation of certain Red Cross personnel. They deal with transportation of their household effects. They deal with privileges with respect to the use of commissaries, PX's and other privileges that are accorded civilian employees of the Department of Defense. They deal with the housing or quartering of the Red Cross officials or representatives that I referred to.

They require or they are concerned with certain particular privileges extended to the Red Cross in the field by way of opportunity to purchase clothing and uniforms and the same as generally issued to the members of the armed forces. They apply also to providing for temporary wear, I would say, as the gear aboard ship.

And then there are other logistical supports prescribed that do not apply specifically to the people, transportation of articles necessary for the Red Cross in carrying out its commitments, storage and warehouse facilities for them, [fol. 162] provides for office space on a base for Red Cross, custodial provisions, provisions under certain restrictions, and generally these are the type of logistical support that

are described pursuant to the requirement of the law and the subsequent developments in implementing the law.

Q. Would you describe in the same summary the services which the Red Cross furnishes to the military establishments?

A. The services that they perform are again very numerous, and they cover the whole gamut of what I might refer to as social services and humane services to the members of the armed forces and to their dependents or relatives.

They particularly serve the patients in hospitals in many ways of providing visits and other services to alleviate the situation of the patients.

They provide also some services which are of particular assistance to the armed forces in carrying out their mission. These are services which are rendered only by the National American Red Cross. For instance, the regulations provide that where there is a patient in the hospital, perhaps overseas or far distant, and there is a request by the military surgeon for supplemental information concerning the patient and it is requested of the Field Director, I believe, to carry it out, this information or this request is flashed out to the local community where the military man came from and is provided in the investigation of a Red Cross [fol. 163] representative and is speedily transmitted back to the physician.

This is done when requested by the attending physician, military physician, and by the patient, if competent. This indicates that it may be more commonly used for a diagnosis, for instance, of some apparent or semblance of a mental condition, or, let us say, where a man claims he was shellshocked it would have to do with the determination perhaps of whether it was malingering or genuine, and if it does involve any kind of possible psychosis whether it is organic or whether it is functional, and the family background of the patient is important with respect to aiding the physician, the military physician, in his diagnosis, and this service is rendered by the National American Red Cross.

Q. Is that service rendered by any establishment within the military itself?

A. No.

Q. Is it rendered for the military by any establishment other than the American National Red Cross?

A. This is the prescribed channel for this communication, and this communication is provided by the Red Cross. Whether at any time there might be an isolated instance where some other one may have contributed, I don't know of any.

Q. Are there any other services rendered to the military establishments by the American National Red Cross which [fol. 164] involves communication and reporting which are not ordinarily rendered by any establishment within the military or any other establishments other than American National Red Cross outside of the military?

A. Yes, and this is perhaps in terms of volume the larger service which I consider to be uniquely, at least from a practical standpoint, available from the Red Cross only, and these are reports having to do with situations that might require compassionate action by the military authorities.

It might be that a member on a far distant assignment learns in a letter or otherwise that his wife is critically ill and he asks for compassionate leave. The commanding officer asks the field director to secure this information. It is flashed out on the local chapter. The information is carefully gleaned by the representative and sent back to the commanding officer, who makes the decision. This has to do with a wider gamut, but that's one example.

As of the end of the first quarter of March, there were an average of 2,400 such communications a day, and I would venture an opinion from the copies of correspondence that have come over even my desk that with the situation in Viet Nam that 2,400 is larger today. This is a service which is very vital to the operation of the armed forces and is provided to the degree that I have indicated.

[fol. 165] And, finally, there is another service which is prescribed by these regulations having to do with commanding officers who are authorized court-martial jurisdiction involving a dishonorable discharge or a bad conduct discharge, and where the military person has been found guilty, upon request, he asks for the Red Cross to provide him with the family background of the defendant now found guilty of a serious offense, which involves in a sense a life sentence if he has a dishonorable discharge. For the rest of his life, he has this disgrace hanging over him and the difficulties of adjusting to society and employment, and the Red Cross sends back the data upon which, before sentence is made, the judge can temper justice with mercy, can evaluate the type of sentence to be made.

This, of course, is, as Your Honor well knows and all of you, a common practice through our civil courts on a probation staff. I suppose I read hundreds of them myself when I was on the bench and they were extremely important as to yes or no, where to place a child, for instance, but the commanding officer has no probation officer and he must rely on this important function of the National Red Cross organization.

Q. In your opinion, could the armed services operate properly and efficiently without the services of communicating and reporting in aid of medical diagnosis and treat-
[fol. 166] ment and in making compassion reassignments or discharges or in connection with sentencing, which you have testified are services rendered only by the American National Red Cross through the military services?

A. Well, I think really the thrust of your question is proficiently and effectively I suppose I couldn't deny the fact or wouldn't swear to the fact that it would be theoretically possible to increase the armed forces to train certain individuals for this type of investigation, to take on people who have these skills, and say to the Red Cross, "We don't need you any more."

Quite aside from the expense that would be involved, quite aside from the question of securing appropriations

from Congress to pay for the personnel, I think that the job would not be done as efficiently or effectively. I can't see how they could track the thousands of volunteers that supplement and work under the direction and guidance of trained personnel in the Red Cross, and I hope that's a responsive answer to your question.

Q. Well, I understand you to say that though it is conceivable that the military services—

Mr. McKevitt: Now, I object, Your Honor. Counsel is testifying rather than interrogating.

The Court: Yes, counsel, you don't need to summarize his testimony.

[fol. 167] By Mr. Massar:

Q. Is it your answer that these services must be performed by some agency for the military to operate efficiently and effectively?

A. I would say yes.

Q. Whether that service be within the military or whether it be an adjunct to the military?

A. Well, I have indicated within the military the limitations and difficulties involved.

Q. Is there any statute comparable to Section 2602 of Title 10 which deals with the relationship between the armed forces and any other organization other than the American National Red Cross?

Mr. McKevitt: I am going to object once again on the grounds that these are statutes. If there are some, counsel can bring them out to the Court, and it is for the Court's own conclusion and review to determine if they are.

The Court: That's probably so, but he can answer. He is in the area.

Mr. Massar: I believe his special competence—

The Court: Whether any other statutes exist, I suppose.

The Witness: I may answer?

The Court: Yes.

A. No.

By Mr. Massar:

Q. Do you know how many Red Cross personnel are [fol. 168] presently assigned to serve the armed forces and at how many different military locations they are stationed?

A. If my memory serves me properly, a figure of around 1,728. I have some notes here, but they haven't been admitted in evidence, so I haven't referred to them, and it seems to me that the—I think, if I may say so, counsel, this paper would be admitted in evidence and I could refer to it.

Q. Have you received recently a report from the American National Red Cross as to the number of Red Cross personnel assigned to serve the military and military establishments?

A. I did.

Q. And I show you a letter dated June 16, 1965, addressed to you, by the Assistant Counsellor of the American Red Cross, and ask you whether that's the report to which you refer?

A. It is.

Q. Do you wish to refresh your recollection as to the number of personnel now assigned to military establishments from that report?

Mr. McKevitt: We will object, Your Honor. That's not a proper qualification, I don't believe, for past recollection recorded, because this is a report from somebody else. [fol. 169] The recording was not made by the witness.

The document itself is hearsay because the party who has tendered it has not testified as yet and so far is not present in the court to testify, and, therefore, it is not a proper document to give him a past recollection recorded.

The Court: It is a letter from the American Red Cross?

Mr. Massar: It is.

The Court: I don't believe you have offered it in evidence either.

Mr. Massar: I will offer it in evidence, if counsel wants it. I was hoping to keep the record free of unnecessary

encumbrances, but I will be happy to offer it if counsel insists.

Mr. McKevitt: I would like to voir dire the witness.

This document that you received, was it received from John L. Currin, an Assistant Counsellor for the American National Red Cross?

The Witness: It was given to me by a member of the Red Cross. I don't know what his name was at this time.

Mr. McKevitt: Well, is the signature of John L. Currin reflected thereon as having addressed the document to you?

The Witness: I am not competent to pass on his signature.

[fol. 170] Mr. McKevitt: Is his named typed in there?

The Witness: His name is typed in there, that's correct.

Mr. McKevitt: And there is a signature above it, is that correct?

The Witness: There is a signature above it. Both "John L. Currin".

Mr. McKevitt: Is Mr. Currin present in the courtroom?

The Witness: I don't know Mr. Currin. At least, by name.

Mr. McKevitt: Pardon?

The Witness: I don't know Mr. Currin by name.

Mr. McKevitt: You would base your testimony as to questions just posed to you by counsel on the basis of this document which has been submitted to you, is that correct?

The Witness: I based it on the entire document, yes.

The Court: Counsel, your objection to the letter is sustained. There is no proper basis for the letter.

Mr. McKevitt: Pardon?

The Court: Your objection is sustained. There is no proper basis for the letter, and the witness has already testified as to his recollection.

Proceed, counsel.

By Mr. Massar:

Q. Will you refresh your recollection?

[fol. 171] The Court: He has already testified, counsel. Go ahead.

Mr. Massar: Did you want a copy of this for your files?

Mr. McKevitt: Yes, please, thank you.

By Mr. Massar:

Q. Do you recall at how many locations the Red Cross personnel are dispersed throughout the world?

A. Are you referring to the number of Red Cross professionally trained people?

Q. Assigned to military establishments.

A. As I pointed out, I would need to refresh my recollection, both as to the number and both as to where they are assigned. This is information on the letter which we were discussing here.

Q. Would you refresh your recollection, please, and testify as to that?

The Court: He can't do that, counsel. He either has a recollection or he can refresh it from something that he was instrumental in preparing. If he has an independent recollection, he can testify to it.

Do you know, approximately? I think the question was how many installations at which there are present Red Cross personnel, if I understood it correctly, throughout the world. Do you know, approximately?

The Witness: Your Honor, these figures that I referred [fol. 172] to as the number as well as where they are dispersed is contained in the letter that's in dispute. The information was verified by the Department of the Army, which is a part of the Department of the Defense, and I accepted that as authentic.

The Court: Do you have any recollection? Can you answer the question of counsel, if I understood the question, how many locations—

Mr. Massar: Approximately how many locations.

The Court: Throughout the world there are at present Red Cross personnel?

A. I will do the best I can. 240 odd—44, I believe—in the continental United States, and I just can't swear to the accuracy of this, I believe it is something around 75 overseas.

By Mr. Massar:

Q. Does this represent the totality of Red Cross personnel engaged in servicing the armed forces?

A. It has no reference at all, of course, to the thousands of volunteers that implement the services.

Q. And by those, you refer to the personnel at the various chapters throughout the country?

Mr. McKevitt: I object. The question is leading, Your Honor.

The Court: Yes.

By Mr. Massar:

Q. To whom do you refer by the term volunteers?

[fol. 173] A. Well, the myriad of services that they render, the Gray Ladies, the transportation, the driving back and forth, the services they render in the hospitals and where blood is given, and, of course, those that are assigned to chapters throughout the United States and overseas.

Mr. Massar: I have no futher questions of the witness.

Mr. McKevitt: Thank you, counsel.

Cross examination.

By Mr. McKevitt:

Q. You refer to these eight areas that are covered by Manpower, is that correct, Mr. Jackson?

A. Yes, the eight deputies.

Q. How many undersecretaries do you have?

A. Deputy secretaries?

Q. Deputy secretaries.

A. These are deputies to the Assistant Secretary, Mr. Ball, that you are referring to?

Q. How many assistant secretaries do you have?

A. Assistant secretaries to the—

Q. Secretary of Defense.

A. Secretary of Defense?

Q. Right.

A. I am not sure now, but there is R and D, Research [fol. 174] and Development, Finances, of course, Installations and Logistics, Procurement, the Assistant Secretary for Administration. The General Counsel has the rank of Assistant Secretary, but he doesn't go by that title. Those I think are the assistant secretaries to the Secretary of Defense.

Q. All right, and then you are a Special Assistant to the particular Assistant Secretary for Manpower?

A. That's right.

Q. How long have you been employed by the Department of Defense, sir?

A. I came to the Department of Defense in October of 1950.

Q. And you have been there ever since?

A. Yes.

Q. You mentioned your previous experience on the bench. In what capacity was that, sir?

A. Well, I was a Justice of Domestic Relations Court in the City of New York from '34 to 1944.

Q. Your testimony previously given regarding the efficiency and the economic aspects of failure to use the Red Cross and use military forces instead, Mr. Jackson, referring to this testimony, this is true because of the fact that you don't pay the Red Cross any money to use this service, do you?

A. We do not pay out cash money.

[fol. 175] Q. You give them supplies to distribute, do you not?

A. That's true.

Q. Naturally day follows night, it would be more expensive for you to set up a military organization when you have this other organization, namely the American National Red Cross, which is trained to do these various functions which you want them to do, is that correct?

A. Without a doubt.

Q. And for such reason your opinion was so given as to that question, wasn't that correct?

A. I haven't restricted it to that reason. That's one of the reasons.

Q. What are the other reasons, sir?

A. That even if they did it, there is the practical, pragmatic difficulty of—or, if they attempted to do it—of eliciting approval from the budgetary committees of the Congress to pay out huge sums of money to substitute for a service which is adequate, doesn't have these expenses and is doing a fine job.

Q. And because of the popularity of the American Red Cross and its past reputation, Congress wouldn't stand still for it, would they?

A. I don't know that it is solely because of the popularity.

Q. Well, from economic aspects as well, isn't that [fol. 176] correct, sir?

A. Well, now, I am a little confused as to where I was in answering this question. I started to say I don't know that it is the popularity alone. I think Congress is cognizant of that, but I think they would take an extremely dim view of scrapping an organization that is doing an outstanding job and for years has been historically dedicated to humanitarian services and set them aside and increase the armed forces to do it otherwise.

Q. To do it by the military services?

A. To set money aside for military or civilian either could be costly.

Q. Isn't it true that although they aren't recognized and given the recognition that the American National Red Cross is that the armed forces and their dependents benefit from the services of the Salvation Army?

A. I think they do in some instances.

Q. Is this not also an economic savings to the Department of Defense and United States Government?

Mr. Massar: I object to this line of questioning, and I fail to see its relevancy as to the nature of the American Red Cross. We never prove the nature of one by proving the nature of the other.

Mr. McKevitt: Well, my purpose is not that. My purpose is to clarify the question which counsel previously [fol. 177] posed to the witness, namely this is the sole functioning agency that aids the United States Government.

The Court: I think the subject was raised by the Government on that point. You may inquire.

By Mr. McKevitt:

Q. Did you finish your answer, Mr. Jackson?

A. I don't think I gave an answer. I would like to ask—

The Court: Will you read the question?

The Reporter: "Is this not also an economic savings to the Department of Defense and United States Government?"

A. (Continued) I am not certain, but I certainly wouldn't challenge that along the area of the various problems that arise that the Salvation Army at times and possibly other agencies make some contribution of assistance to the members of the armed forces.

By Mr. McKevitt:

Q. And is this not also of economic benefit to the Department of Defense?

A. Well, I am not familiar with the extent that they have done so, and it would be difficult to make an appraisal of the economic benefits.

Q. Isn't that a possibility, Mr. Jackson?

A. Possibility. I would certainly not want to disparage the services of any other of these fine agencies, but I think if it wasn't rendered by them it would be rendered by the [fol. 178] Red Cross anyhow, if it were the type of service I have been referring to here.

Q. But the fact still exists they do render these services to the military forces and their dependents?

A. I haven't said they do. I said I would not challenge any evidence that they did. I do not know that they do.

Mr. McKevitt: That's all I have.

Redirect examination.

By Mr. Massar:

Q. Judge Jackson, is there any agency other than the American National Red Cross which is authorized by the military to investigate and report to it with respect to family history, medical history, or other matters in connection with the determination by the military of matters of compassionate reassignment or discharge or for use in connection with sentencing of convicted military personnel at military court-martials or for use in connection with medical diagnosis or treatment of personnel?

A. I have indicated in my direct testimony, at least intended to, that these were unique services, barring the rare possibility of specific instances, that were uniquely provided and set forth in the regulations and the directive implementing the law, and that's my firm belief.

Q. You mean anything provided by the American National Red Cross? You mean uniquely furnished by the Red Cross?

[fol. 179] A. That's right.

Q. So, if the Salvation Army did furnish services to the military, it would not be services of the nature you described in my previous question?

A. That is right, with the possibility of a rare instance where they might have come into the picture. I know of none, and I know this is the standard operating procedure for the American National Red Cross to provide particularly these three types of services.

Mr. Massar: Thank you.

Recross examination.

By Mr. McKevitt:

Q. But, there are other services as well which are given to military services and military people and their dependents, are there not, sir?

A. I think I have answered that to the best of my ability.

Mr. McKevitt: All right. That is all I have, Your Honors.

The Court: You may step down.

May the witness be excused, counsel?

Mr. McKevitt: I have no objection, Your Honor.

The Court: You will be excused.

The Witness: Thank you, Your Honor.

Mr. Massar: Edward McDermott.

[fol. 180] Edward A. McDermott called as a witness by the plaintiffs, being first duly sworn, on his oath testified as follows:

Direct examination.

By Mr. Massar:

Q. Your full name, please?

A. Edward A. McDermott.

Q. Your address?

A. 5400 Albermarle Northwest, in Westmoreland Hills, Maryland, which is a suburb of Washington.

Q. What degrees do you hold and from what institutions?

A. I have a Bachelor of Arts degree from Loras College in 1939, Juris Doctorate degree of the College of Law, University of Iowa, '42, and an Honorary Doctorate degree in 1962.

Q. Of what bars are you a member?

A. I am a member of the bar of the States of Iowa and Nebraska, the bar of the United States District Court for the Northern District of Iowa, the bar of the District Court of the District of Columbia and the Supreme Court of the United States.

Q. What has your professional experience been since graduation from law school?

A. In the early years of my professional career I was in the corporate law department of Montgomery Ward and [fol. 181] Company in Chicago. Subsequent to the war, I entered the private practice of law in Dubuque, Iowa, and I practiced law there until 1950. At that time, I was appointed chief counsel of a committee of the United States Senate. I served in that capacity in Washington for a period of approximately one year, returned in 1959 to the general practice of law in Dubuque, Iowa, continuing there until early 1961 when I took a leave of absence from my law firm and was appointed Deputy Director of the Office of Civil and Defense Mobilization in the Executive Office of the President by President Kennedy.

Q. Would you state what your connection has been with the disaster relief programs of the Federal Government?

A. In my capacity as Deputy Director of the Office of Civil and Defense Mobilization, 1961 and 1962, I had association with the Federal disaster assistance program, and then in 1962 when President Kennedy founded or established the Office of Emergency Planning as an element of the Executive Office of the President, I was appointed

Director of that agency and served in that capacity until February 1st of this year, 1965.

During my tenure as Director of the Office of Emergency Planning, I had responsibility on behalf of the President for coordination and directing all Federal assistance in presidentially declared major disasters.

Mr. Massar: I would ask the Court at this time to take [fol. 182] judicial notice of Public Law 875 of the 81st Congress, Second Session, which appears in Volume 64 of the Statutes at Large, at pages 1109 to 1111, and in Title 42 of the United States Code, Section 1855, 1958 Edition, and Supplement 5 to the 1958 Edition.

By Mr. Massar:

Q. Mr. McDermott, would you describe for us the congressional scheme for Federal disaster relief?

A. Well, under Public Law 81-875, when a natural disaster of major proportions occurs in any of the states of the United States or territories or possessions of the United States covered by the act, the governor or chief executive officer of the territory may petition the President or request the President for the declaration of a major disaster.

That request is administratively referred by the President to the Director of the Office of Emergency Planning, whose field personnel will have made a survey of the particular disaster, and on the basis of that survey the Director of the Office of Emergency Planning makes a recommendation to the President whether this particluar disaster qualifies for presidential declaration.

If the Director so recommends and the President approves the Director's recommendation, the President makes a declaration of major disaster for the defined area.

With that presidential act, then there is invoked the services and activities of a large number of Federal depart- [fol. 183] ments and agencies who have specifically assigned responsibilities to assist in the disaster problem, and the

activities of the several departments and agencies as well as the activities of the American National Red Cross are coordinated on behalf of the President by the Director of the Office of Emergency Planning.

Federal disaster assistance in terms of direct expenditure of Federal funds are given to the public sector damaged in the disaster. Federal funds are disbursed for a wide range of enumerated eligible purposes, such as the restoration of roads and bridges, the restoration of publicly owned utility systems, the restoration of water and sanitary sewage systems, the restoration of transportation systems, the clearing of debris, the elimination of area-wide health hazards, those sorts of programs.

There is no direct Federal program that addresses itself to the individual and personal needs of the private citizens who have been so adversely affected by that disaster. The private citizen relief and the private sector relief in terms of direct financial or material assistance is through the American National Red Cross, rather than through the Federal Government.

Q. As a result of any statutory duty imposed upon the American National Red Cross?

A. Yes, it is in furtherance of its charter obligation un- [fol. 184] der the charter of the American National Red Cross and it is pursuant also to an agreement that has been worked out between the executive branch of the Government and the American National Red Cross, approved by the Congress of the United States.

There is a memorandum of understanding between the Office of Emergency Planning and the National Director of the American National Red Cross, which generally defines the respective areas of operation and responsibility.

Q. Is the statutory provision to which you refer the provision of Section 3 of Title 36, which in enumerating the purposes of the American National Red Cross says, "to continue and carry on the system of national and international relief in time of peace and apply the same in mitigating the

sufferings caused by pestilence, famine, fire, floods, and other great national calamities, and to devise and carry on measures for preventing the same"?

A. It is my understanding—

Mr. McKevitt: I would like to suggest to the Court that there is an obvious ambiguity and that is for the Court to determine.

The Court: I think the question is whether it was referring to this section. The witness may answer.

By Mr. Massar:

Q. You may answer.

A. I believe I indicated that was my understanding.

[fol. 185] Q. You referred to a statement that was prepared between the Office of Emergency Planning and the American National Red Cross. Was that statement prepared while you were Director of Emergency Planning?

A. Yes, it was.

Q. I show you a document which has been marked for identification as Plaintiffs' Exhibit 8, and ask you whether that is a correct copy of the statement of understanding to which you refer?

A. It is.

Q. Did you sign that statement?

A. I signed the statement on August 3, 1962, as Director of the Office of Emergency Planning, and it was signed in my presence and on the same date by General Alfred M. Gruenther, as President of the American National Red Cross.

Mr. Massar: I offer this document, of which a copy has been furnished to counsel.

Mr. McKevitt: This is one copy I did not reecive. I got all the others, but I didn't get this one.

The Court: Hand him the original, please.

Mr. Massar: And for the convenience of the Court, I hand up three additional copies of the document.

(Copies of Plaintiffs' Exhibit 8 were handed to the Court and counsel.)

Mr. McKevitt: May I have a minute to review the docu-
[fol. 186] ment?

The Court: Yes.

(Counsel perused the exhibit.)

Mr. McKevitt: I have no objection. I would like to ask counsel for a copy.

Mr. Massar: I furnished you one by mail and I thought I furnished you another this morning.

The Court: Let's not argue about it. Give him a copy. Exhibit 8 will be admitted.

(Plaintiffs' Exhibit 8 was received in evidence.)

Mr. McKevitt: Is that the one you mailed to me?

Mr. Massar: Yes, it was.

Mr. McKevitt: All right. May I have a moment?

Mr. Massar: Will you see if you have it?

The Court: Proceed with the witness, counsel.

By Mr. Massar:

Q. Do individual disaster victims ever seek directly from the President or from the Office of Emergency Planning the relief assistance for their individual disaster-caused needs?

A. Yes, very frequently, and without exception when a major natural disaster occurs.

Q. What does the President or Office of Emergency Planning do with the requests?

A. Those requests reach the Office of Emergency Plan-
[fol. 187] ning from primarily three sources. One, the referral from the President's office of letters addressed to him by individuals. Secondly, the referral to the Office of Emergency Planning by members of Congress of letters addressed to them by constituents. And, thirdly, letters addressed directly to the Office of the Director of Emergency Planning.

In all of these instances where the request relates to individual suffering or individual and personal requirements to recoup from the effects of disaster, those inquiries and requests are referred to the American National Red Cross, with an explanation of the Federal disaster program, explaining that the Federal governmental program applies to the public sector.

Q. Are contributions ever forwarded to either the President of the United States or Office of Emergency Planning to assist in the Federal Government's disaster relief program?

A. It frequently occurs from the occurrence of a major public disaster, particularly one that has received considerable publicity such as the Alaska earthquake and things of that nature, that charitable individuals or others who have not suffered will send offerings to the Office of Director of Emergency Planning to assist individuals in the alleviation of that disaster.

It was the procedure while I was Director of that agency to acknowledge those funds on behalf of the President, or [fol. 188] myself if they were addressed to me, and transfer the funds to the American National Red Cross.

Q. Would you give us some example of the recent disasters and describe the working relationships that existed between the Red Cross and the Office of Emergency Planning and other Federal agencies in caring for those disasters?

A. I will endeavor to summarize concisely as I can what, of course, with the concerns of a major disaster, becomes a very involved and complex situation.

First of all, the Office of Emergency Planning, as the President's disaster agency, is in touch with the American National Red Cross at the Washington level as soon as a disaster threatens. That close liaison continues at the national level throughout the active period of Federal disaster assistance.

Also, in the area directly affected by the disaster, there is close liaison between the regional authority of the Of-

fice of Emergency Planning, the regional representatives of other involved Federal departments and the local representatives of the American National Red Cross.

Frequently when a disaster occurs such as the flooding in the Ohio River Valley, the President will personally wish to make an inspection trip of the area. The same thing happened in the hurricane and highway damage in Florida and Georgia about a year ago. When presidential inspection trips are taken, the President is normally accompanied [fol. 189] by the heads or policy level representatives of the Federal departments that will have a major involvement in rehabilitation, and in every instance by the National President or a national officer of the American National Red Cross, so that in the performance of Federal disaster assistance relief activities, both at national level and on the scene, there is a continuing close liaison between the Federal departments and Red Cross personnel in furtherance of the implementation of disaster assistance which restricts Federal assistance to the public sector and American National Red Cross assistance to the private sector.

Mr. Massar: I have no further questions of the witness at this time.

Pardon me, my colleagues question my recollection that the statement of understanding was received in evidence. I assume it was.

The Court: It was admitted, that's correct.

Cross examination.

By Mr. McKevitt:

Q. Mr. McDermott, you are no longer with the Office of Emergency Planning, are you?

A. I resigned from that position effective February 1, 1965, and on that date became a partner in a law firm in Washington, where I am now engaged once again in the private practice of law.

[fol. 190] Q. And you are working in international commercial law at the present time?

A. Yes, and hopefully to a greater extent in the future.

Q. Referring to Plaintiffs' Exhibit No. 8, which I take it you are familiar with—

A. Yes, I have a copy of it here.

Q. All right, sir, this was an agreement, was it not, entered into between the Office of Emergency Planning and the American National Red Cross on August 3, 1962?

A. That's correct.

Q. And it was a bilateral agreement, was it not?

A. A bilateral agreement.

Q. Is this agreement still in effect?

A. To the best of my knowledge, it is. It was in effect when I resigned from my responsibilities as of February 1st.

Q. And this agreement, was it drawn up to serve as a sort of a guideline as to the cooperation between the Office of Emergency Planning and the American National Red Cross under Title 42?

A. Correct, the purpose of this agreement, counsel, was an effort to reduce to writing in a concise a form as possible the working relationships that were intended to exist between the various Federal departments and the American National Red Cross in disaster situations.

This is in essence the reflection of the operational pro-
[fol. 191] cedures as they were being carried on, and General Gruenther and I concluded that it would be advantageous to all concerned to reduce this understanding to this written form for distribution, not only to those in the Federal Government who are concerned with the public sector assistance, but also to Red Cross personnel who are concerned with the private sector, so it was strictly a bilateral agreement and arrangement beween the Office of Emergency Planning and American National Red Cross.

Q. And it was entered into on a voluntary basis by both organizations and no direction by Congress or anything else that the agreement be entered into?

A. That is correct. There was no direction. It has been referred to on several occasions on committees in Congress and other committees who have occasion to discuss disaster situations, but it was not done in pursuance to a congressional direction.

Q. And as far as this agreement is concerned or so far as the working arrangements are concerned, you do not subsidize the Red Cross or give them any direct cash grants or any financial assistance, do you?

A. No, the Office of Emergency Planning does not, and the only financial transactions that existed between the Office of Emergency Planning and Red Cross were this routing of funds received in a post-disaster situation from in-
[fol. 192] dividuals throughout the United States, to which I alluded.

Q. This is done on a protocol or voluntary basis where the funds are received by the President of the United States or Director of Emergency Planning and you are in a situation where you must tender them to an organization so you tender them to the Red Cross through a voluntary act?

A. Well, you have some options. Generally, funds received—there are instances where funds are received by the President or Federal Government from individuals not specifically earmarked for any purpose and we transfer those funds to the Secretary of Treasury, but in this instance where they are disaster related and are intended for the relief of suffering of individuals as the result of the disaster, in furtherance of the Federal program which recognizes the Red Cross as the agency to administer to those needs, they are transferred to the Red Cross, but that's done simply in furtherance of the total Federal disaster assistance program.

Q. But it is not done through statutory requirement?

A. No, no statutory requirement.

Q. It is done particularly where you have a contribution from an individual to you as distributor?

A. Correct, and we are carrying out the intention of the contributor.

Q. As I understand your testimony, is it not correct that the purpose of this agreement with the American National [fol. 193] Red Cross as far as disaster relief is concerned under Public Law 875 and Title 42, which we have been discussing previously, is that the Federal Government, namely the Office of Emergency Planning, steps in and takes care of the public needs and American National Red Cross takes care of the private needs?

A. That's a fair statement of the broadest aspects of Federal disaster assistance, yes.

Q. Take, for example, the present Denver situation where the Governor has requested financial assistance from the United States Government—these moneys which are so tendered by the United States Government, if and when, would be used for public purposes only?

A. That's correct.

Q. And none of them would be tendered to the American National Red Cross?

A. That is correct.

Q. They would be, as you say, highway construction, bridges, sewage facilities and water and et cetera?

A. That's correct.

Q. And you would expect the American National Red Cross, so far as financial assistance is concerned, to work that out and maintain their own situation?

A. That is supported by voluntary contributions which it receives and from other private sources.

[fol. 194] Q. You worked on the Alaska disaster, did you not, Mr. McDermott?

A. Yes, I did, sir.

Q. And you have, I would say, probably somewhat of a great personal knowledge of the operations up there?

A. I have quite a lot of knowledge. I was the first Federal official to arrive on the scene and was there eight or nine times subsequently.

Q. Is it not true that the local chapters of the Salvation Army assisted up there as well?

A. They did an outstanding job, as well as many other formal and informal voluntary organizations and associations of individuals.

Q. Which all worked together in addition to the American Red Cross?

A. Correct, under the general coordination of the American Red Cross as it relates to private sector relief.

Mr. McKevitt: That is all I have, Your Honors.

The Court: Any further questions?

Mr. Massar: I have no further questions of this witness.

Mr. McKevitt: I have no objection to the permanent excusal of the witness, Your Honor.

The Court: You may be excused.

The Witness: Thank you, Your Honor.

[fol. 195] Mr. Massar: Philip Schenkenberg.

PHILIP R. SCHENKENBERG called as a witness by the plaintiffs, being first duly sworn, on his oath testified as follows:

Direct examination.

By Mr. Massar:

Q. Your full name, please?

A. Philip Rosen Schenkenberg.

Q. Your address, please?

A. 4050 Lindell Boulevard, St. Louis, Missouri.

Q. What degrees do you hold and from what institutions?

A. I have a Bachelor of Law degree from Marquette University, Milwaukee, Wisconsin, 1933.

Q. By whom are you employed and in what capacity?

A. The American National Red Cross. I am the Area Manager for the Mid-Western Area, consisting of 16 states, including the State of Colorado.

Q. And how long have you been employed by the American National Red Cross?

A. Since 1942.

Q. What do your duties consist of?

A. As the Area Manager, it is my responsibility to see that the local units of the American Red Cross, known as chapters, are provided with information and service to develop programs for people in the jurisdictions for which they are responsible.

[fol. 196] The second responsibility is to provide the Red Cross services to the armed forces on military installations and in military hospitals within this 16 state area, and, third, to be responsible for the operations of disaster relief in major disasters that occur in those 16 states that are beyond the ability of the local units to handle.

Q. Do your duties require that you be familiar with the charter, by-laws and other operating regulations of the American National Red Cross?

A. Yes, sir.

Q. And are you familiar with the charter and by-laws of the American National Red Cross?

A. Yes, sir.

Q. I hand you a document which has been marked Plaintiffs' Exhibit 9 for identification, and ask you whether this contains an accurate copy of the charter and by-laws of the American National Red Cross as of this date?

A. Yes, sir.

Mr. Massar: I offer this in evidence and call to the attention of the Court that this document has some slight changes which have occurred since the—

The Court: Let's take care of the offer. Do you have any objection?

Mr. McKevitt: I have no objection, Your Honor.

[fol. 197] The Court: It will be admitted.

(Plaintiffs' Exhibit 9 was received in evidence.)

Mr. Massar: This is slightly different from the copy which was offered at the pretrial, embodying some changes that have occurred in the last year.

The Court: Are there any changes that are significant?

Mr. Massar: There are a couple that might have been significant on the issue that we thought was in the case but which has been withdrawn, so for all practical purposes this document is no different than the one that was offered on the pretrial.

This one was for the convenience of the Court. The clerk already has the official one in evidence.

The Court: Does counsel have a copy?

Mr. Massar: Yes, he does.

Mr. McKevitt: Counsel has advised me of this copy, Your Honor.

The Court: It will be admitted.

By Mr. Massar:

Q. Has the Board of Governors of the American National Red Cross adopted any rules or regulations for its management now in effect apart from the by-laws which have just been introduced in evidence?

A. Yes, sir.

Q. And what are they shown as?

[fol. 198] A. The Code of Procedure.

Q. And what does the Code of Procedure cover?

A. The Code of Procedure sets forth the basis on which local units, chapters, will be organized, operated and dissolved. It also provides for the rules of conduct for the national convention and establishes an area advisory council of volunteers.

Q. I hand you a copy of the document which has been marked for identification as Plaintiffs' Exhibit 10, and ask you whether that is a correct copy of the Code of Procedure of the American National Red Cross as of this date? Do you have a copy of that?

A. Yes, sir.

Mr. Massar: I offer this document in evidence. The clerk has the one that has been marked for identification and I hand up one for the convenience of the Court.

Mr. McKevitt: Defendant has no objection, Your Honor.

The Court: It will be admitted.

(Plaintiffs' Exhibit 10 was received in evidence.)

Mr. Massar: And I again point out to the Court that there is a slight modification in there which occurred since the date of the pretrial order. However, the change is not significant for any purposes of this trial.

By Mr. Massar:

Q. Mr. Schenkenberg, would you please describe in brief form the services rendered the armed forces by the Ameri- [fol. 199] can National Red Cross?

A. To elaborate a little bit on what has been given in prior testimony, I would point out that the United States does maintain a rather large armed force, that these personnel are distributed not only throughout the United States but in foreign countries. A large number of the military are married and have families and many of them are separated from their families. There are, I believe, something in the neighborhood of four million dependents of the armed forces, and most of these dependents are in the continental United States.

There are four major areas of service in the welfare field that the Red Cross carries on. The first is communication service, which is the means by which the Red Cross endeavors to exchange information between the home community, the home family, and the serviceman, wherever he may be stationed. This often occurs in connection with births and serious illness, these kinds of family problems that do occur.

The second program is the reporting service. This has been referred to by the Department of Defense witness, in which the military officials look to the American Red Cross

to obtain information for them, to verify certain data or information upon which they can rely in order to make a decision. This has to do with granting emergency leaves, extension of emergency leaves, compassionate transfers, discharge for compassionate reasons, medical histories, medical discharges, and some of the others that were men-
[fol. 200] tioned earlier.

Then the third service within the welfare field is financial assistance, because in some of these family problems that do occur there is a financial need.

And, fourth, there is the counseling services. Because there are personal problems, family problems, the Red Cross personnel are available to counsel both with the member of the armed forces and/or with the family in order to try to relieve or eliminate the problem.

These are the four general broad areas of service.

Q. Are these services rendered by reason of a belief of the American National Red Cross that these would be desirable services to render, or are they rendered because the duty is imposed upon the American National Red Cross—

Mr. McKevitt: I object. It is a leading question, Your Honor.

Mr. Massar: May I finish the question, Your Honor?

Mr. McKevitt: Excuse me, counsel.

Q. (Continued) Or are these services rendered because the statutory act by which the American National Red Cross was incorporated imposes upon it the duty to render these services?

Mr. McKevitt: I object, Your Honor. First, it is leading, and, secondly, it relates to a matter which is a determination of the Court.

The Court: I believe he may state his opinion on the
[fol. 201] subject.

A. The position has been adopted by the Board of Governors that there is an imposition on the organization to provide these services as called for in rather broad terms in the

charter, and in consultation with the Department of Defense this has been the determination of the program that should be provided to meet the imposition of duties called for in the charter.

Q. Specifically, do you refer to subdivision 4 of Section 3 of the corporation's charter as imposing these duties on it?

A. Is this the section that sets forth the purposes?

Q. Yes, it is, and reads, "To act in matters of voluntary relief and in accord with the military authorities as a medium—"

Mr. McKevitt: I am sorry to interrupt.

The Court: Just refer to the section. The witness knows the section. What was your answer?

The Witness: Yes.

The Court: All right.

By Mr. Massar:

Q. Does any other organization apart from the American National Red Cross render the kind of services to which you referred to the military departments?

A. Not to my knowledge.

Q. Could you describe a typical case in which the Ameri- [fol. 202] can National Red Cross is requested by the military to investigate and report on matters on which the military needs to be informed and needs to take action of some kind?

A. Well, this is an actual case still being served. A man is stationed with the armed forces, stationed in Turkey on an 18 month tour of duty. While he is gone, his wife and small child are staying with the wife's parents in California. The child developed a heart condition, which local medical authority felt should be taken care of by surgery.

There was communication between the Red Cross chapter in California and the Red Cross field director in Turkey, who in turn talked with the man to inform him of the de-

veloping conditions, also verified this with the commanding officer.

The question was raised as to whether or not the man should be given emergency leave. The commanding officer withheld decision, asking for more information with regard to what the plans were. It was reported back that it would take a little bit of doing to have this surgery arranged for. It was to be arranged for at a military hospital because of it being a dependant of a man in the armed forces.

The chapter arranged for the mother and child to come to Denver, provided transportation for them to get here. The local Red Cross chapter helped the mother get temporary housing. The child was admitted to Fitzsimons General Hospital. The medical authorities decided that condi- [fol. 203] tions were not proper for surgery, so—

Mr. McKevitt: Your Honor, I hate to interrupt the witness. I think this is a hearsay answer.

If there is any testimony he can give as to his personal knowledge, I don't mean to cut out a living example, but at the same time he keeps referring to the chapter did this and the family did this and said that.

Unless he was there when the conversation was given, it is hearsay and objectionable, and I move the answer be stricken.

The Court: He is probably going into unnecessary detail, but we take it as a description of the mechanics in handling this type of case, and I think for that purpose it is proper.

Mr. McKevitt: All right, sir.

A. (Continued) The result was that the operation was finally arranged. Timing was reported back to Turkey. Arrangements were made by the commanding officer to grant the man emergency leave. He got back here to be here for the operation.

It turned out that the medical military authorities said that the child should continue to have treatment, and this

necessitated the serviceman's desire to ask for a compassionate transfer, so here was the inner workings of the [fol. 204] Red Cross, the serviceman, the family and the commanding officer in trying to arrive at some proper plan for this serviceman and his family.

By Mr. Massar:

Q. Are the services such as you have just described rendered in war as well as peace?

A. Yes, sir.

Mr. Massar: I at this time offer in evidence a report, the annual report of the American National Red Cross, for the year ended June 30, 1962, which has been marked Plaintiffs' Exhibit 12 for identification, there being no Exhibit 11, a copy of which has been furnished to counsel for the State and an additional copy of which is handed up for the convenience of the Court. This is offered as an official document.

Mr. McKevitt: If Your Honor please, I rise to a point of possible disagreement with counsel that I will have no objection to the admissibility of the annual reports of plaintiff in this action if he will have no objection to those annual reports of plaintiff which I may tender which he fails to tender to the Court.

Mr. Massar: I have no objection to his tendering any annual report of the American National Red Cross for any year.

Mr. McKevitt: I have no objection, Your Honor.

The Court: No. 12 will be admitted.

[fol. 205] (Plaintiffs' Exhibit No. 12 was received in evidence.)

By Mr. Massar:

Q. Mr. Schenkenberg, are you familiar with the 1962 Annual Report of the American National Red Cross, a copy of which has just been received in evidence as Exhibit 12?

A. Yes, sir.

Q. And does it describe the services rendered in a typical peacetime year by the American National Red Cross?

A. Yes, sir.

Q. What additional services has the American National Red Cross rendered to our armed forces in time of war that is additional to those which you have described?

A. Well, I described what we called the welfare services. There are other services that we have provided, some of them only in wartime, others that are provided in peacetime but on a reduced basis.

For example, prisoner-of-war packaging and distribution, which is only done in wartime, the making of surgical dressings, the knitting of sweaters and other special type garments for members of the armed forces.

We have collected large amounts of blood and distributed blood and blood derivatives to the armed forces. We have assisted in nurse recruitment when many more nurses were needed. We have operated recreational facilities in military facilities, and we still do this on a medically approved basis [fol. 206] for those that are hospitalized. These are some of the other kind of services we perform.

Q. Do you in time of war render assistance to the injured on the battlefield?

A. The American Red Cross has not.

Q. Their services are limited to the hospitals?

A. Of our own personnel.

Q. The hospitals to which you have just referred are hospitals in battle areas, are they not?

A. They are all military hospitals.

Q. Actually in combat areas?

A. Yes.

Q. They are not at home necessarily?

A. Wherever the military has hospitals, we have personnel providing welfare services, recreation, comfort and this type of service.

Q. Are any other organizations apart from the American National Red Cross permitted to render any such services in military hospitals?

A. This question is one like we got hung up on before, I think. The Red Cross is the vehicle by which these services are offered. It is the organization through which the military expects to have services performed, so that, for example, if there is a group that would like to provide some volunteer service in Fitzsimons General Hospital this is [fol. 207] arranged through the Red Cross, but we are happy to take advantage of all offers of volunteer service or goods.

Whether it is the Salvation Army or the Lions Club or the American Legion or whatever organization, we are the vehicle through which these people are able to come in and provide these services in the military hospital. Now, this is not true in the Veterans Administration hospitals, but it is true in the military hospitals.

Mr. Massar: In accordance with counsel's offer or statement that he makes no objection to receipt in evidence of any annual reports of the American National Red Cross, I now offer in evidence annual reports for the years 1941, '42, '43, '44, '45 and '46, which have respectively been marked for identification as Plaintiffs' Exhibits 13, 14, 15, 16, 17 and 18, copies of which have been furnished to counsel for the State, and identical copies were reposing with the clerk and these additional copies being handed up for the convenience of the Court.

Mr. McKevitt: I wish to just check the marking, if I may, counsel, please?

Have these been marked?

Mr. Massar: Oh, I haven't marked these. Those are the marked ones.

Mr. McKevitt: Excuse me a second, sir.

(Counsel perused exhibits.)

[fol. 208] Mr. McKevitt: I have no objection, Your Honor.

The Court: Exhibits 13 through 18 will be admitted. Proceed, counsel, let somebody else mark those.

(Plaintiffs' Exhibits 13, 14, 15, 16, 17 and 18 were received in evidence.)

By Mr. Massar:

Q. Mr. Schenkenberg, are you familiar with the annual reports of the years 1941 through 1946, copies of which have just been received in evidence as Plaintiffs' Exhibits 13 through 18?

A. Broadly stated, yes.

Q. And do they in your opinion reflect the services, the typical services, rendered by the American National Red Cross during the war years?

A. Yes, sir.

Mr. Massar: I have no further questions of the witness.

Mr. McKevitt: May I inquire of the wishes of the Court so far as the lunch hour is concerned, Your Honor?

I would estimate my cross-examination would last 10 to 15 minutes approximately.

The Court: We will take the noon recess. Counsel, how many more witnesses do you have?

Mr. Massar: I have no further witnesses. I have further documents which I will offer up to the Court without the need of witnesses.

[fol. 209] The Court: How long do you expect that will take?

Mr. Massar: I have approximately 40 documents and I would say the time required will depend altogether on what objections, if any, Mr. McKevitt will have.

I think the authenticity of all except perhaps one or two of those documents have been waived by counsel and I—

The Court: Fine, well, if during the noon hour you would be sure the documents are marked and that the two of you would be sure that you each have the same copies.

Has counsel been furnished copies of all of them?

Mr. Massar: He has a copy of each and I am confident an exact copy of each will be offered.

Mr. McKevitt: I might state to the Court, if the Court has any question regarding the length of the noon hour we will easily finish this afternoon. We have no witnesses and ours will be based on cross-examination and the submission of exhibits and possibly one more exhibit.

The Court: We will be in recess until 1:30.

(The Court recessed at 12:02 o'clock p.m. and reconvened at 1:30 o'clock p.m.)

Cross examination.

By Mr. McKevitt:

Q. How many areas do you have throughout the United States, Mr. Schenkenberg?

A. There are four domestic areas and two overseas areas.

[fol. 210] Q. And you are the administrator of one of these areas?

A. Yes, sir.

Q. And that's the Mid-West area in St. Louis?

A. Yes, sir.

Q. And you were previously handed annual reports for the years 1941 through 1946. Would you state, in your opinion, Mr. Schenkenberg, that all facts and statements in there are true and correct, to the best of your knowledge?

A. To the best of my knowledge.

Q. Were you employed by the Red Cross during the war years?

A. I started in 1942.

Q. And were you employed by the American Red Cross in 1946?

A. Yes, sir.

Q. Is it not correct that Mr. Basil O'Connor was the Chairman of the National Red Cross for the year ending 1946?

A. He was Chairman of the American Red Cross. For what the exact years were, I do not recall.

Q. But he was during the year of 1946, or one of the years, was he not?

A. Well, as I recall—I do not recall the specific years—he was during part of the war period, World War II period. As best as I can remember, he was the Chairman in 1946.

[fol. 211] Q. As Chairman, he was vested with the primary administration of the American National Red Cross, was he not?

A. Yes, sir, he was the chief officer.

Q. In other words, he is an active chairman. He is not an honorary chairman, is that correct?

A. That's correct.

Q. Sort of like the president of the board or president of the corporation or chairman of the board?

A. Yes.

Q. Now, in addition to your services for armed forces, veterans and so forth, it is true, is it not, that you also perform work in the way of blood service, nursing, safety services for chapters, educational programs, public information, international services?

A. Yes, sir.

Q. And these relate to private causes, do they not?

A. All programs that we have are related to the two basic functions of the organization, namely, to serve the armed forces and disaster victims. These programs to which you refer, such as the blood program, first aid, water safety, nurse instruction, our youth movement, our office of volunteers, these are all in existence in the organization in order to be prepared to meet the emergency services that are required under the charter.

Q. Well, it is also for the betterment of the community [fol. 212] and for private individuals?

A. We hope so.

Q. I mean, a continuing blood bank, for example, and so that children won't drown in the waters, and et cetera, isn't that one reason you maintain those programs?

A. Yes, sir, but they all stem from these other two responsibilities. For example, the first aid program was an outgrowth of the earthquake in San Francisco, and when a good many people died because they didn't know how to treat their injuries it was decided that this was a program that the Red Cross should engage in in order to reduce the loss of life and injury in the time of disaster. Each of the programs originated this way.

Q. Is it not correct that local chapters have optional provisions or rights to conduct separate programs, if their budget allows and the time allows, et cetera?

A. Yes, sir, there are only four duties that a chapter must perform, the local unit. One is to give service to the armed forces, the other to give disaster relief assistance, to conduct a fund appeal to support these things, and to interpret the Red Cross to their community, and then there are these other programs that are optional with the local units.

Q. For the year ending 1963, would you deny the fact that approximately 33⅓ percent of the American National Red Cross budget was used for armed forces, veterans and [fol. 213] their families, and the remainder was used for disaster service, blood service, nursing, safety service or programs, educational programs, international services and general management?

A. Well, I have not looked at the annual report for that period, but the percentage figure will fluctuate from year to year because the amount spent on disaster fluctuates, so that it might be a third one year and it might be 50 percent another year.

In our publicity, we generally say that about 40 percent of the funds spent by the Red Cross are spent in the services to the armed forces program. Now, this is the program I described before lunch as the welfare program.

We do not, as a matter of recordkeeping, break down what costs we may have in providing swimming instruction, providing blood services to the armed forces, instructor courses in first aid. We may provide these services, but we have not separated those in the dollar figures that you refer to in the annual report, so this is a minimum figure in the annual report actually of what we spend for the armed forces.

Q. Well, is it your testimony, Mr. Schenkenberg, that all these Gray Ladies we have around and station wagons and so forth and movement of patients and blood programs are all for one prime purpose, to keep ready for war and national disaster?

A. Yes, sir.

[fol. 214] Q. Solely for that purpose?

A. To be prepared to carry out the responsibility.

Q. How often do you use water safety instructors during a national disaster, do you know?

A. Well, we don't have too frequent use of this. As I mentioned before, we have the water safety program as an outgrowth of the broad description of endeavoring to prevent disaster, disaster in the form of drownings.

Occasionally, we are called upon to assist in recovering bodies that have been drowned persons, and as I mentioned before we do provide such training courses as survival swimming for the armed forces.

Q. Is it not true that in some years, Mr. Schenkenberg, the majority of your moneys expended go to non-governmental personnel or dependents?

A. Yes.

Q. Do I understand your testimony previously to state that the Salvation Army and other agencies have assisted you?

A. Well, are you talking about disaster or services to the armed forces?

Q. Both.

A. Well, in disaster service to the community, we endeavor to rally all the resources of the community to help

the disaster victims, and this includes a multitude of community organizations, men's groups, women's groups, [fol. 215] church groups and the Salvation Army.

In the program for the armed forces, the only program that I think of at the moment in which we are involved in utilizing other organizations is in connection with the recreation program in military hospitals, where we have a limited professional staff, and we recruit volunteers from the local Red Cross chapter to provide these recreation activities for those that are hospitalized there, and we welcome the opportunity to use other volunteers from other community organizations.

Q. Mr. Schenkenberg,—excuse me, I am sorry, are you finished?

A. Yes, sir.

Q. All right. Well, during a natural disaster the Salvation Army, for example, doesn't have to wait for you? They can go right ahead and go into the area, can they not?

A. Yes, sir.

Q. They are not under your jurisdiction or control, are they?

A. No. However, many times, when the Salvation Army has performed a canteen service, the American Red Cross has reimbursed the Salvation Army for the supplies that they have purchased to provide the canteen service.

Q. I take it you are familiar with the makeup of the Board of Governors for American National Red Cross?

[fol. 216] A. Yes, sir.

Q. And there are 50 voting members, are there not?

A. Yes, sir.

Q. Of which the President of the United States appoints eight, and seven have a vote, is that correct?

A. I believe all eight have a vote. The Chairman has a vote if he chooses to exercise it.

Q. Is it the policy of the American National Red Cross to approve all of its measures by a majority vote?

A. Yes, sir.

Q. The President of the United States serves only as the honorary chairman? He is not the active chairman of the American Red Cross, is he?

A. No, sir.

Q. And you retain a private certified public accounting firm in Washington, namely Haskell and Sells, do you not, or in New York?

A. Yes, sir.

Q. And they conduct your annual audit, or one of them?

A. Yes, sir.

Q. And the Department of Defense conducts the other one, and you reimburse them for their expenses, is that not correct?

A. Yes, sir.

Q. You maintain a private general counsel office in [fol. 217] Washington, of which Mr. Harold Starr is General Counsel, is that not correct?

A. Yes, sir.

Q. And you maintain local counsel, such as Mr. Henderson, in Denver, who is on a retainer, is that not correct?

A. Yes, sir.

Q. You are not civil service?

A. No, sir.

Q. Are any employees of the American Red Cross, to your knowledge, under American civil service?

A. No, sir.

Q. You have your own retirement program?

A. Yes, sir.

Q. You also have workmen's compensation for all employees?

A. Yes, sir.

Q. And you are so insured by the Travelers Insurance Company?

A. Yes, sir.

Q. You also have or are qualified for retirement benefits, or your employees are, under the Social Security program, commonly known as OASI, is that correct?

A. Yes, sir.

Q. So, you have double benefits, namely OASI and your private retirement program?

[fol. 218] A. Yes, sir.

Q. Is it not also correct you retain a private insurance company, namely Travelers, to insure all your vehicles for liability, bodily injury and property damage?

A. I am no authority on the insurance program. We have some insurance in the general liability field, but as far as our own property is concerned we carry this as a self-insured item, so there are certain incidences that we do carry and some we do not.

Q. Let me phrase my question this way, is it not correct you do have insurance coverage from a private insurance company operating from a commercial profit venture to insure your motor vehicles which are titled in the name of the American National Red Cross?

A. No, it is my understanding that we are self-insured as far as our own vehicle is concerned, but our liability insurance is carried with Travelers.

Q. You mean for operation of automobiles?

A. For any damage that is done by those vehicles.

Q. All right, sir, thank you. Do you have a building in Detroit which you rent out or part of it to a profitmaking body? Is that not correct? In other words, you rent it out on a profit basis?

A. The Detroit chapter owns a building in which part of the building is subrented to other organizations, some of [fol. 219] which are commercial.

Q. And you collect rent on this building and this goes to the general fund of the American National Red Cross, is that correct?

A. No, the funds that come in the operation of that building are administered and handled by the local Red Cross chapter.

Q. Don't the local chapters turn their money over to the national headquarters in Washington and submit a budget yearly?

A. A portion of the annual fund appeal that is made is turned in to the national organization.

Q. Now, it is also correct, is it not, that you pay motor vehicle license fees and registration fees in each state in which you operate these vehicles which you own?

A. Yes, sir.

Q. You seek no immunity from the state or Colorado, for example, for this registration, do you?

A. No, by administrative practice this is considered to be desirable, to waive any eligibility for immunity.

Q. And you also pay a real estate tax on the building in Detroit for the portion that's to organizations—

A. That is income producing.

Q. Right.

A. Yes, sir.

[fol. 220] Q. You do not use Federal license plates on your vehicles within the United States or have your drivers operate with Federal driver's licenses, do you, Mr. Schenkenberg?

A. Not to my knowledge.

Q. In other words, you have the license plate of the state and the drivers are required to have a valid driver's license for that state, is that not correct?

A. Yes, sir.

Q. All your vehicles are titled in the name of the American National Red Cross, are they not?

A. Yes, sir.

Q. It is also correct, is it not, that you withhold state income tax from your employees in the State of Colorado?

A. I can't answer that question.

Q. You have two types of funds from which you operate, namely the general fund and the endowment fund, within the American National Red Cross, do you not, Mr. Schenkenberg?

A. Yes, sir.

Q. Would you state briefly or briefly describe both of these funds?

A. Well, the general funds are those funds that are obtained in the annual appeal for voluntary contributions, and the endowment fund was established for the purpose

of hopefully someday having a fund from which certain administrative costs could be paid from the earnings, so [fol. 221] as a matter of policy the Board of Governors deposits all funds received from bequests that are not restricted for some special use into the endowment funds, and only the earnings from the endowment fund are used each year and transferred to the general fund to supplement the amount that comes from the annual contributions received in the campaign.

Q. In other words, you don't touch the corpus of the endowment fund, is that correct?

A. That's correct.

Q. This is all done at the discretion of the Board of Governors and a committee of nine or a board of investment trust—I forget the exact title—which the Board of Governors appoints?

A. The Board of Trustees.

Q. And that is composed of nine people?

A. I believe so.

Q. And they are appointed by the Board of Governors?

A. Yes.

Q. And they make the decisions on the investments of the endowment fund?

A. Yes.

Q. Is it not correct that the endowment fund moneys are invested, in addition to U. S. Government bonds, in private companies, such as preferred stocks, bonds of private corporations?

[fol. 222] A. I believe that's correct.

Q. And also in common stocks, is that not correct?

A. I believe that's correct.

Q. And also real estate investments? You invest in real estate mortgages for this endowment fund?

A. I don't know the answer to that question.

Q. All right, sir. Then, am I correct in stating your prime source of financial support is from donations or from bequests or gifts going either into your endowment fund or fund-raising programs throughout the United States?

A. The major source of income is from the annual appeal to the public for funds, and this is supplemented by the earnings of the endowment fund and by earnings of the general funds.

Q. It is also correct that the Army audit agency of the Department of Defense never has rejected one of your annual reports, have they?

A. Not to my knowledge.

Q. Am I correct in stating that the Board of Governors in your national headquarters has the power to hire and fire employees on a local or chapter level?

A. The authority?

Q. Right.

A. Yes, sir.

Q. Now, it is also true, is it not, that you have representatives of Veterans Administration offices throughout the [fol. 223] country?

A. Veterans Administration regional offices.

Q. For what purposes are they there?

A. This is an expert who represents the veterans who have given the Red Cross the power of attorney to process their claims with the Government under benefits that are provided for under the laws for benefits to veterans. The veteran is in the community. The Red Cross chapter counsels, helps the veteran there, in making out his applications pursuing his claim, and the Red Cross field director at the Veterans Administration regional office will personally represent the veteran.

Q. He represents him on a legal basis as his legal counsel before the Veterans Administration?

A. No, sir, they are not attorneys.

Q. But they do appear on their behalf, given the power of attorney, and they appear on their behalf?

A. That's true.

Q. And examine witnesses and cross-examine witnesses and handle your case for you, do they not?

A. I don't believe this is their role.

Q. What is their role?

A. I am sorry, I can't tell you too well. They do anything that will be helpful in bringing to the review board's attention information that they feel is pertinent to the [fol. 224] process of the claim.

Q. These services are also conducted by the American Legion, Disabled Veterans and Veterans of Foreign Wars, are they not?

A. There are other accredited organizations that perform these duties.

Q. Mr. Schenkenberg, you testified there was a different method of operation between the Veterans Administration hospitals and military hospitals, and you never got to finish that statement. Would you finish that for me, please?

A. Well, as I said before, in the military hospital the Red Cross is the exclusive agency that the military expects to coordinate all volunteer recreation service to the hospitalized in a military hospital. The Veterans Administration has a different practice, and they—we are just one of any number of organizations that offer volunteer services in a Veterans Administration hospital and they have a Veterans Administration staff person who does the coordinating.

Q. In other words, other organizations are recognized as well to do this service, is that correct?

A. In the Veterans Administration.

Q. What are those organizations, do you know?

A. Well, they are the different veterans groups, American Legion, Veterans of Foreign Wars, DAV, can be any group, Lions Clubs.

[fol. 225] Q. Salvation Army?

A. Yes, sir.

Q. Is it not true that your employees receive no benefit, Federal benefit of any sort, other than a Social Security retirement?

A. Yes, sir.

Q. The Red Cross, to the best of your knowledge, has never received any appropriations from any state legislature?

A. No, sir.

Q. Is it not correct that your nurses, when they perform services in various states, obtain licenses in that state before they perform their services?

A. Yes, sir.

Mr. McKevitt: I have no further questions, Your Honor.

Mr. Massar: I have no further questions, if the Court please.

The Court: You may be excused.

Do you have anything further, counsel?

OFFERS IN EVIDENCE

Mr. Massar: I have no further witnesses. I do have further documents that I would like to introduce in evidence.

I offer in evidence at this time House Document No. 262, which has been marked Plaintiffs' Exhibit 19 for identification, the document being a message from the President of the United States transmitting to the Congress the Cumu- [fol. 226] lative Report on Refugees and Foreign Relief Operations, from July 1, 1940 through April 30, 1946.

A copy of this document has been lodged with counsel for the State.

A copy of the document which was I think No. 20 on the list appended to the pretrial order is also presently with the Court, and since this document which has been marked in evidence, marked for identification, represents the last copy from the archives of the American Red Cross, we would like permission if this is received in evidence to withdraw either the copy of the copy previously lodged with the Court.

The Court: Objections, counsel?

Mr. McKevitt: May I review it?

This is one of the ones on the pretrial order?

Mr. Massar: Yes, sir.

Mr. Currin: It was 18 there.

Mr. McKevitt: No, 19.

Mr. Currin: It was 18 on the pretrial order.

Mr. McKevitt: There is no argument on authenticity, a stipulation having been made.

We would argue on the grounds it is a hearsay document. The party giving the message, namely President Truman as I recall, is not here for cross-examination, and it is not an admissible document.

For such reason, our objection is so made.

[fol. 227] It is also a statement made to third persons which are not a party to this action.

Mr. Massar: This document being an official document of the United States—

The Court: It will be admitted. You may have permission to withdraw it and substitute a copy for it.

(Plaintiffs' Exhibit 19 was received in evidence.)

Mr. Massar: I offer at this time a document entitled "Foreign War Relief Operations", submitted by the American National Red Cross to the President of the United States, it being the final cumulative report on distribution by the American National Red Cross of relief supplies purchased with Government funds from July 1, 1940 through June 30, 1946.

Copies of this document have been furnished to counsel for the State.

A copy was lodged with the pretrial order as No. 19, and the document now offered has been marked for identification as Plaintiffs' Exhibit 20.

Three additional copies are now handed to the Court for its convenience.

The Court: Was this transmitted by the President to the Congress in the course of proceedings?

Mr. Massar: As is stated on the list appended to the pretrial order, this document was transmitted to the Congress [fol. 228] by President Truman on March 21, 1947, as is reported in the 93rd Congressional Record, at page 2423.

The Court: Any objections, counsel?

Mr. McKevitt: Your Honor, I will object once again. First of all, it is a report relayed by President Truman to the Congress, but it is also a report prepared or certified by the Chairman of the National Red Cross as to a report on particular activities.

Once again, it is a document between third parties, and I would object on that ground.

The Court: Well, we will consider it an official report. It will be admitted.

(Plaintiffs' Exhibit 20 was received in evidence.)

Mr. Massar: I offer in evidence at this time a document which has been marked as Plaintiffs' Exhibit 21 for identification.

It appears as Document No. 14 on the list appended to the pretrial order.

It is entitled "The Distribution of Government Owned Wheat and Cotton, Official Report by The American National Red Cross Covering the Disposal of Surplus Commodities in Aid of People in Distress as Authorized by Congress, 1932-33".

A copy of this document has been previously furnished to counsel for the State and a copy has been lodged with the clerk and two additional copies are now handed to the [fol. 229] Court for its convenience.

Mr. McKevitt: I have no objection, Your Honor.

The Court: It will be admitted.

(Plaintiffs' Exhibit 21 was received in evidence.)

Mr. Massar: I would ask the Court to now take judicial notice of Public Resolution No. 12, 72nd Congress, approved March 7, 1932, which appears in 47 Statutes at Large, page 61; Public Resolution No. 33, 72nd Congress, approved July 5, 1932, which appears in 47 Statutes at Large, page 605; Public Resolution No. 329, 72nd Congress, approved February 8, 1933, which appears in 47 Statutes at Large,

page 799; and, Public Resolution No. 647, 72nd Congress, approved March 3, 1933, which appears in 47 Statutes at Large, page 1544.

These are the resolutions pursuant to which the Red Cross undertook the activities on which it reported in the document received in evidence as Exhibit 21.

The Court: We will consider them.

Mr. Massar: At this time, I offer in evidence Proclamations issued by Presidents Taft, Wilson, Coolidge, Hoover, Franklin D. Roosevelt, Eisenhower, Kennedy and Johnson, which have respectively been marked for identification as Plaintiffs' Exhibits 22 through 29, copies of each of which have been furnished to counsel for the State and copies of each of which, except that of the Proclamation of President Johnson, which is marked Exhibit 29, have been furnished [fol. 230] to the Court, together with a pretrial order, and copies of each of which are now in the custody of the clerk of this court.

The Court: Is there any objection?

Mr. McKevitt: May I see Exhibit 29?

(Counsel perused exhibit.)

Mr. McKevitt: So far as all the exhibits except 29, Your Honor, are concerned, we have stipulated to the authenticity.

Exhibit 29 we have not stipulated on authenticity, so we would object on the grounds of authenticity on Exhibit 29.

So far as all these exhibits are concerned, including 29, these are all presidential proclamations, which I submit are hearsay in nature, irrelevant to the cause, and—

Mr. Massar: We submit, Your Honors, that each of the proclamations is relevant in that they indicate the position of the executive department the Government has taken with respect to the status of the American Red Cross.

The Court: Counsel, we will take judicial notice of all proclamations.

Mr. McKevitt: Your Honor, I am sorry, I didn't hear.

The Court: We will take judicial notice of all the proclamations that are listed, including 29.

Mr. Massar: This is an additional copy of 29, which I hand up for the convenience of the Court.

I offer in evidence at this time a document which the [fol. 231] clerk has marked for identification as Plaintiffs' Exhibit 30, it being a copy of a concurrent resolution of the 84th Congress, Second Session, which appears at 70 Statutes at Large, page B 32, dated June 6, 1956, passed by the Congress on the occasion of the 75th anniversary of the American National Red Cross, and which records that the Congress takes notice of the important work of the American Red Cross and of its position as an official agent of this government.

A copy of this resolution has been furnished to counsel for the State. A copy is in the hands of the clerk and three additional copies are handed up for the convenience of the Court.

The Court: What number is this on the pretrial?

Mr. Massar: 24.

Mr. McKevitt: We have no objection, Your Honor.

The Court: It will be admitted.

(Plaintiffs' Exhibit 30 was received in evidence.)

Mr. Massar: I now offer in evidence a document which the clerk has marked for identification as Plaintiffs' Exhibit No. 33, there being no Exhibits 31 and 32, which document is Report No. 1728 of the House of Representatives, 82nd Congress, Second Session, it being a report to accompany H. R. 7345, dealing with tax exemption accorded to sports programs conducted for the American Red Cross, and in which document the House of Representatives records its view that the American Red Cross is a quasi-[fol. 232] governmental agency.

Copies of this document have been provided to counsel for the State and copies are in the hands of the clerk of the court and three additional copies are now handed up for the convenience of the Court.

Mr. McKevitt: No objection, Your Honor.

The Court: It will be admitted.

Mr. Massar: On the pretrial order, that was Document No. 27.

(Plaintiffs' Exhibit 33 was received in evidence.)

Mr. Massar: I now offer in evidence documents which have been marked Plaintiffs' Exhibits 34, 35, 36, 37, 38 and 39 for identification, they being copies of documents numbered 28, 29, 30, 31, 32 and 33 on the pretrial and the list appended to the pretrial order, copies of each of which have been furnished to counsel for the State, copies of each of which are in the hands of the clerk of the court.

Each of those documents are rulings by the Internal Revenue Service according special tax benefit to the American Red Cross on the ground that it is an official agency of the United States.

Mr. McKevitt: I make an objection on those documents, Your Honor. I really feel these are hearsay documents. Once again, under the third party rule, I don't think they are admissible here. I think they have a purely hearsay [fol. 233] character by the fact that the party is not here for cross-examination. They are not made to parties to this action, and made to a third party, and for such reason I object to them.

Mr. Massar: Each of these documents is an official document of the United States, and as such is in the view of the plaintiffs admissible in evidence as relevant to the issue here, it bearing upon the view taken by the executive branch of this government as to the status of the American National Red Cross.

The Court: They will be admitted.

Mr. Massar: I have additional copies of each of these documents, which I hand up for the convenience of the Court.

(Plaintiffs' Exhibits 34, 35, 36, 37, 38 and 39 were received in evidence.)

Mr. Massar: At this time I offer in evidence a document which has been marked Plaintiffs' Exhibit 43 for identification, it being Document No. 4 on the list appended to the pretrial order, it being an opinion as to the status and duties of the American National Red Cross issued by John W. Davis, then Solicitor General of the United States and Counsellor of the American National Red Cross.

A copy of this document was furnised to counsel for the State. The copy is in the hands of the clerk of the court. Additional copies are here available for the convenience of the Court.

[fol. 234] Mr. McKevitt: I object on the ground that this is the opinion of one party, Your Honor, which is substitution for the determination by this Court as to the legal status of the party plaintiff, and as such is inadmissible.

The Court: It will be received for whatever it is worth.

(Plaintiffs' Exhibit 43 was received in evidence.)

Mr. Massar: I now offer in evidence a document which has been marked Plaintiffs' Exhibit 44 for identification, a copy of which has been furnished to counsel for the State, a copy of which is in the hands of the clerk, and copies of which I will hand up for the convenience of the Court, this document being a ruling by the Chief of the Army and Air Force Exchange Service as to the right of the American Red Cross to purchase gasoline and other motor fuels from the Army and Air Force Exchange Service without the payment of tax, it being offered as evidence of the view taken by the executive arm of the Government as to the status of the American National Red Cross.

The Court: Who issued the letter or ruling?

Mr. Massar: The Chief of the Army and Air Force Exchange Service.

The Court: I don't believe that's admissible, no.

Mr. Massar: At this time I offer in evidence documents which have been marked as Plaintiffs' Exhibits for identification Nos. 45, 46, 47, 48, 49, 51, 52, 53, 54, 55, 56, 57, 58,

[fol. 235] 59 and 60, there being no Exhibit 50, these documents having been previously numbered on the list attached to the pretrial order as 37, 38, 39, 41, 42, 47, 48, 49, 50, 51, 52, 54, 55, 56 and 61, copies of each of which have been furnished to counsel for the State and copies of each of which are in the hands of the clerk of the court and additional copies of all of which will be handed up for the Court's convenience, each of these documents being opinions by the Attorneys General of the States of Texas, California, Tennessee, Alabama, Georgia, New York, Ohio, New Mexico, Tennessee, Wisconsin, Georgia, Pennsylvania, Oregon, New York and Arkansas dealing with the exemption of the Red Cross either from taxes or from statutes requiring the registration of charitable organizations which solicit funds on the ground that the American National Red Cross as an agency of the United States is not subject to such taxation or regulation.

Mr. McKevitt: If Your Honor please, these are all Attorney General opinions as counsel pointed out of various states and relate to the interpretation of various states and have no bearing on the statute here or on the Colorado Employment Security Act as set forth in Chapter 62, 1953 Colorado Revised Statutes.

I think these matters are hearsay from the aspect they are addressed to a third party.

Secondly, they don't touch upon the issues we have here. [fol. 236] Three, they are merely personal opinions. Four, they are not Federal in that they are merely state agencies throughout the United States touching upon the Red Cross as it pertains to their particular state.

For such reasons, my objections are made.

The Court: Sustained.

Mr. Massar: I ask the Court at this time to take judicial notice of each of these rulings by the Attorneys General of the various states so that they may have them before them as authorities with which they may agree or disagree in reaching their conclusion in this case.

The Court: No, we will not accept them for that purpose.

Mr. Massar: I would observe at this point that though the rulings did deal with specific state statutes—

The Court: We made the ruling, counsel. Go ahead with the next exhibit.

Mr. Massar: I now offer in evidence documents which have been marked for identification as Plaintiffs' Exhibits 62, 63, 64, 66, there being no 65, 68 and 69, these same documents having been numbered 40, 43, 45, 58, 57—that is, No. 69 was numbered 57 on the pretrial order, on the list appended to the pretrial order. No. 68 was not listed on the list appended to the pretrial order, but a copy of that document has been furnished to counsel for the State.

[fol. 237] Each of these documents are rulings by the executive officers of various states and the District of Columbia other than Attorneys General as to the immunity of the American National Red Cross from tax statutes or solicitation statutes of the various states in which those officers held office.

Copies of each of these documents are in the hands of the clerk. Additional copies are here available for the convenience of the Court.

I offer these documents in evidence.

Mr. McKevitt: If Your Honor please, these are also, once again, opinions from state officials, some of whom are even in inferior status, if there be such, to Attorneys General. They are legal counsel, et cetera.

For such reasons and the reasons I gave in my last objection, I would reiterate my objections once again.

The Court: I think they are in the same category as the previous ones. The objection will be sustained.

Mr. Massar: I now offer in evidence a document which has been marked Exhibit 71 for identification.

I do not believe counsel has officially seen a copy of this document. I apprised him of it earlier this morning when we first obtained a copy of it.

I now hand it to him for his perusal, being an executive order of Governor John A. Love of the State of Colorado—

[fol. 238] The Court: Just hand it to him.

Mr. McKevitt: Your Honor, I have not seen it officially or unofficially. This is my first perusal. May I take a moment to read the document, Your Honor?

The Court: Yes.

(Counsel perused exhibit.)

Mr. McKevitt: May I see the original document, Your Honor? Is it tendered to the Court?

Mr. Massar: That's what I am tendering. I asked you to waive authentication of that document.

Mr. McKevitt: I object on several grounds. One, on authenticity. Two, it was not included in the pretrial order. Counsel was not given notice of the document within the period required by the Court.

Three, it is not an actual document. It is a copy. Fourth, it is a proclamation by the Governor, not by a Federal official of the United States.

The Court: It will be sustained.

I think the Court asked you to furnish opposing counsel copies during the noon hour.

Mr. Massar: I talked to counsel just before we left the courtroom and he said he didn't want to be bothered at that time. I told him I didn't want to have—

Mr. McKevitt: Your Honor, that's an incorrect statement. I hate to differ in front of the Court.

[fol. 239] The Court: Well—

Mr. Massar: I now offer in evidence the document which has been marked Plaintiffs' Exhibit 70 for identification, it being page 12797 of Volume 106 of the Congressional Record for June 22, 1962.

A copy of this page has previously been furnished to counsel for the State. A copy of it is appended to one of the affidavits or briefs previously submitted to the Court and the exhibits of which are listed as the documents with respect to which authentication was waived by the pretrial order.

The Court: Which one is it?

Mr. Massar: It is No. 1, I think. It may not—it is right at the beginning of the pretrial order. It may not be numbered.

Item 1, which says, "All pleadings and briefs and attachment thereto which have heretofore been filed."

The Court: Any objection?

Mr. McKevitt: Yes, Your Honor. May I examine the document?

Is this stipulated as to authenticity?

Mr. Massar: That's my understanding. That's been our understanding of the pretrial order.

Mr. McKevitt: You had it marked as Exhibit 70?

Mr. Massar: Item 1.

[fol. 240] The Court: Is this attached to the pleadings?

Mr. Massar: It is attached to—

The Court: An affidavit? What is it? Where did it come from? Is this part of the legislative history of the 1960—

Mr. Massar: It is, Your Honor.

The Court: It will be admitted.

Mr. McKevitt: May I make my objections for the record, Your Honor, on it?

The Court: Yes.

Mr. McKevitt: I object, first of all, on the grounds I do not see in the pretrial order where it was listed.

Mr. Massar: Mr. McKevitt, it is listed as No. 1.

The Court: He says it is part of the pleadings.

Can you tell us, has anybody found where it is yet?

Judge Arraj: I believe it is on page 8, isn't it?

Mr. McKevitt: My other objection is made on this basis, and I cite the case of Aldridge vs. Williams, 44 US, page 9.

I submit that what the purpose of this is, or I take it what the purpose of the tendering of this entry of the Congressional Record is for, is to clarify a statute which supposedly is ambiguous, and this goes to the latter point of our argument, after the instrumentality question, the question of whether or not Congress has waived the ques-[fol. 241] tion of Federal instrumentalities and has allowed the State of Colorado to go ahead and tax the plaintiff.

I submit it is clear, referring to Section 3305.

"In expounding this law, the judgment of the Court cannot, in any degree, be influenced by the construction

placed upon it by individual members of Congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself; and we must gather their intention from the language there used, comparing it, when any ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed."

For such reason, my objection is so made, Your Honor.

The Court: It will be admitted.

(Plaintiffs' Exhibit 70 was received in evidence.)

Mr. Massar: I have since discovered perhaps I was misleading the Court and counsel when I said it was attached as an exhibit.

The fact of the matter is the relevant portions were quoted in page 8 of plaintiffs' memorandum in support of the motion for summary judgment.

[fol. 242] Additional copies are handed up at this time for the convenience of the Court.

At this time I would like to spread on the record the stipulation of the parties that in the event that this Court should rule that the American National Red Cross is entitled to refund of any contributions which it has heretofore made under the Colorado Unemployment Security Act that the parties will furnish to the Court the amount which they agree upon as the amount, proper amount, principal amount of refund.

The parties are confident that they will have no difficulty in arriving at that figure.

Do I have counsel's agreement?

Mr. McKevitt: We have no objection to that stipulation, Your Honor.

The Court: All right.

Mr. Massar: With that, Your Honor, plaintiffs have presented their case and rest.

Mr. McKevitt: Defendant rests, Your Honor.

The Court: All right. How much time do you think necessary for your argument, counsel?

Mr. McKevitt: I don't think it would take over 20 or 30 minutes, Your Honor. I mean, from our side of it.

Mr. Massar: I don't think we will need any more than that.

[fol. 243] The Court: A half an hour a side.

Mr. Massar: I would like to split that, if I may, between direct presentation and rebuttal.

The Court: Yes. We will take a short recess before you begin, to get organized.

(The Court recessed from 2:35 o'clock p.m. until 2:47 o'clock p.m.)

(Closing arguments were presented; whereupon, at 3:55 o'clock p.m. the proceedings were concluded.)

Reporter's Certificate (omitted in printing).

[fol. 244]

SUPREME COURT OF THE UNITED STATES

No. 1071—October Term, 1965

Department of Employment, et al., Appellants,

v.

United States, et al.

Appeal from the United States District Court for the District of Colorado.

ORDER POSTPONING JURISDICTION—May 23, 1966

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits and the case is placed on the summary calendar.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. ~~1071~~ 78

DEPARTMENT OF EMPLOYMENT AND
BERNARD E. TEETS, EXECUTIVE DIRECTOR OF EMPLOYMENT
OF THE DEPARTMENT OF EMPLOYMENT, Appellants,

VS.

THE UNITED STATES OF AMERICA, AND
THE AMERICAN NATIONAL RED CROSS, Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

JURISDICTIONAL STATEMENT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No.

DEPARTMENT OF EMPLOYMENT AND
BERNARD E. TEETS, EXECUTIVE DIRECTOR OF EMPLOYMENT
OF THE DEPARTMENT OF EMPLOYMENT, Appellants,

vs.

THE UNITED STATES OF AMERICA, AND
THE AMERICAN NATIONAL RED CROSS, Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States District Court for the District of Colorado, entered on September 8, 1965 with a supplemental judgment entered on September 15, 1965, permanently enjoining the Appellant from assessing or collecting any contributions, taxes, interest, or penalties, against or from the Appellee, The American National Red Cross under the *Colorado Employment Security Act, Chapter 82, Colorado Revised Statutes, 1963* and further directing that the Appellant be directed to refund to the Appellee, The American National Red Cross the sum of $27,927.79 for previous taxes paid

by the Appellee, The American National Red Cross to the Appellant. The Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the District Court for the District of Colorado has not been reported. Copies of the Findings of Fact and Conclusions of Law and Supplemental Conclusion of Law and Judgment of the District Court are attached hereto as Appendix A.

JURISDICTION

This suit was brought under *Title 28 U.S.C., Sections 1331, 1345* for the purpose of determining whether or not the Appellee, The American National Red Cross was entitled to a refund of taxes paid to the Appellant, which exceeded the sum of $10,000 at the time the action was commenced; the Appellee, The American National Red Cross further sought to permanently enjoin the Appellants, their officers, agents, servants, employees and attorneys from assessing or collecting any contributions, taxes, interest, or penalty, under the *Colorado Employment Security Act, Colorado Revised Statutes, 1963;* and for the further purpose of seeking a judicial declaration that the *Colorado Employment Security Act,* supra, was unconstitutional as to its application against the Appellee, American National Red Cross. The judgments of the three judge District Court were entered September 8, 1965 and September 15, 1965. The Appellants filed their notice of

appeal in that Court on November 15, 1965. The District Court subsequently granted the Appellants an Extension of Time up to and including March 1, 1966 in which to file their judicial statement with the Supreme Court. The jurisdiction of the Supreme Court is conferred by *Title 28, U.S.C., Section 1253.*

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Paul v. U. S., 83 S. Ct. 426, 371 U. S. 245, 9 L. Ed² 292; Radio Corp. of America vs. U. S., 71 S. Ct. 806, 341 U. S. 412, 95 L. Ed 1062. U. S. vs. Georgia Public Service Comm., 83, S. Ct. 397, 371 U. S. 285, 9 L. Ed.² 317.*

QUESTIONS PRESENTED

The following questions are presented on appeal to this Court:

1. Where a state statute affords an adequate remedy and requires that an employer contesting his liability under the *Colorado Employment Security Act, Chapter 82, Colorado Revised Statutes, 1963,* file his suit for refund of taxes in the State District Court in and for the City and County of Denver, State of Colorado, is the Appellee, American National Red Cross, precluded from obtaining relief in the United States District Court because it failed to avail its self of and comply with the state's statutory requirements. In the alternative if the Supreme Court were to find that the said State District Court did not have original jurisdiction because of the fact that the Appellee is an instrumentality

of the United States, (See question number 2, infra.) then the only court having original jurisdiction of this suit would be the Supreme Court of the United States; *(U.S.C. Constitution, Article 3, Section 1, Section 2, cls. 1, 2.)* in neither event would the United States District Court have original jurisdiction in this suit.

2. Whether the Appellee, American National Red Cross is an instrumentality or an agency of the United States.

3. Whether the Congress of the United States by its 1960 amendments to the *Federal Unemployment Tax Act* has waived the constitutional immunity of the Appellee, American National Red Cross from the taxation provision of the *Colorado Employment Security Act, Colorado Revised Statutes, 1963.*

STATUTES INVOLVED

The following federal statutes are involved:

1. Title 10 U. S. C. Section 2602 (e), July 17, 1953, Ch. 222, sections 1, 2, 7, 67 Stat. 178, 179.

2. Title 26 U. S. C. Section 3301, September 13, 1960 Pub. L. 86-778, Title V Section 523 (a), 74 Stat. 980.

3. Title 26, U. S. C. Section 3305 (b), September 13, 1960, Pub. L. 86-778, Title V, Section 531 (a) (b), 74 Stat. 983.

4. Title 26 U. S. C. Section 3306 (c) (6) (8) September 13, 1960, Pub. L. 86-778, Title V, 74 Stat. 983, 984, 986.

5. Title 28 U. S. C. Section 1251, June 25, 1948 c. 646, 62 Stat. 927.

6. Title 36 U. S. C. Section 2, May 8, 1947 c. 50, Section 3, 61 Stat. 81.

7. Title 36 U. S. C. Section 7, July 17, 1953, c. 222 Section 5, 67 Stat. 179.

8. Title 42 U. S. C. Section 1855 a. September 30, 1950, c. 1125 Section 2, 64 Stat. 1109.

The following state statutes are involved:

1. Colorado Revised Statutes, 1963.

Section 82-1-3 (8) (e)

Section 82-9-9

STATEMENT

The Appellee, The American National Red Cross (hereinafter referred to as "Red Cross") is organized and exists by virtue of an Act of the Congress of the United States of America, *(Title 36, U.S.C., Section 1, et seq.)* which provides that it is a body corporate politic in the District of Columbia. The Red Cross does not have its principal place of business in the State of Colorado, however, it has a number of chapters in the State of Colorado which employ a considerable number of employees in said state. The Appellant, Department of Employment is an agency of the State of Colorado, charged with the function of administering the *Colorado Employment Security Act* for the State of Colorado *(Chapter 82, Colorado Revised Statutes, 1963.)* The Appellent, Bernard E. Teets is the Executive Director of the Colorado Department of

Employment and as such is the head of the Department of Employment.

The State of Colorado is one of three states which taxes non-profit organizations for unemployment taxes under its Employment Security Act. The Department of Employment is also authorized by the Colorado legislature to tax agencies or instrumentalities of the United States government under the provisions of *Section 82-1-3 (8) (e), Chapter 82, Colorado Employment Security Act, Chapter 82, Colorado Revised Statutes, 1963,* in instances where immunity is waived by the Congress of the United States.

Prior to the commencement of this suit, the Department of Employment determined that the Appellee, Red Cross, was subject to the Colorado Employment Security Act, supra, and demanded payment of unemployment taxes by the Red Cross and its chapters be made together with interest thereon, provided for by the *Colorado Employment Security Act,* supra.

Thereafter, and prior to commencement of this action, payments aggregating more than $10,000 were made involuntarily and under protest by the Red Cross to the Department of Employment. Each of said payments was accompanied by an application for refund, each of which was denied by the Department of Employment prior to the commencement of this suit. Subsequent to the denial of the refunds by the Department of Employment, the Red Cross commenced this suit in the United States District Court, for the District of Colorado joining with them the United States of America as a party plaintiff.

In its Complaint, the Red Cross alleged that it was an

instrumentality of the United States, the kind described by *Title 26, U.S.C., Section 3306, (c) (6) (B)*, and, as such continues, because of the express exception made in *Title 26, U.S.C. 3305 (b)* to be immune under the Federal Constitution, from any requirements to make contributions to any state for unemployment compensation taxes. The Red Cross further contended that it was an instrumentality of the United States of the kind described by *Title 26, U.S.C., Section 3306 (b) (6) (B)* because of the provisions of *Title 26, U.S.C., Section 3306 (c) (8)* which they contended specifically exempted the Red Cross from taxation under the Federal Unemployment Tax Act, *(Title 26, U.S.C., Section 3301 et. seq.)*

The United States of America was joined as a party plaintiff in this suit under the direction and authorization of its Attorney General because of its interest as a sovereign in having *Section 3305 (b) and Section 3306 (c) (6)* supra, properly construed and applied and avoiding infringement of the immunity from state and local taxation, which the United States and Red Cross, as its alleged instrumentality, performing functions essential to the military and civil interests of the United States allegedly enjoy under the Federal Constitution.

Subseqeut to the filing of the Complaint, the Department of Employment moved to strike the United States of America as a party plaintiff; moved to dismiss the Complaint of Red Cross on the grounds that the Court did not have jurisdiction over the subject matter or the parties. The Appellees filed a Motion for Summary Judgment contending that the suit was one the District Court could decide without determination of factual issues and without the need of the Department of Employment filing its

Answer. The District Court denied the Red Cross Motion for Summary Judgment, granted the motion of the Department of Employment to strike the United States of America as a party plaintiff and denied the motion of the Department of Employment to dismiss the claim of the Red Cross.

Thereafter, the Department of Employment filed its Answer denying that the Red Cross was an instrumentality of the United States government and alleging in the alternative, that if the Court found that the Red Cross was an instrumentality of the United States that it was not exempt from taxation under the *Colorado Employment Security Act,* supra, because the Congress of the United States has not specifically exempted it under the provisions of *Title 26, Section 3305 and 3306* of the *Federal Unemployment Tax Act.* The Appellants in their Answer as a separate and affirmative decision alleged that the District Court did not have jurisdiction over the subject matter and that the District Court did not have jurisdiction over the Appellants. Upon presentation of evidence and oral arguments the District Court sitting as a Three Judge Court, ruled the United States of America was a proper party plaintiff to this action; thereby reinstating the United States as a party plaintiff; that the Red Cross was an instrumentality of the United States, and that its immunity as a federal instrumentality had not been waived by the Congress of the United States in its 1960 amendments of the *Federal Unemployment Tax Act.*

In its Supplemental Conclusions of Law and Judgment, dated September 15, 1965, the Three Judge District Court permanently enjoined the Department of Employment and its officers, agents, and employees from assess-

ing or collecting any contributions, taxes, interest, or penalties against or from the Red Cross under the *Colorado Employment Security Act,* supra, and rendered judgment in favor of the Red Cross and against the Department of Employment in the sum of $27,927.79 together with the costs of the Red Cross taxed by the Clerk of the District Court.

THE QUESTIONS ARE SUBSTANTIAL

This appeal presents questions of first impression for the Supreme Court; namely; (1) whether the Red Cross is an instrumentality of the United States and (2) if the Red Cross is an instrumentality of the United States whether the Congress of the United States has specifically exempted the Red Cross from its general waiver of immunity of federal instrumentalities to taxation by the Department of Employment as well as other states in taxing the Red Cross for unemployment taxes. In this case the State of Colorado, Department of Employment, did not give its consent to be sued in the United States District Court. The Appellant contends that the Red Cross had an adequate statutory remedy in the state courts of the State of Colorado for a determination as to its exemption and entitlement to refund, if any, and that the determination of this question is vital. In the alternative, Appellants contend that if the Appellee Red Cross, is an instrumentality of the United States, the Supreme Court of the United States has original jurisdiction rather than the United States District Court for the District of Colorado.

The legal status of the Red Cross has yet to be determined by any appellate court in the United States. The

status of the Red Cross should be determined to decide its liability for taxation not only in the State of Colorado but in other states as well. The Red Cross is one of several organizations which gives assistance to the United States government in matters of defense, disaster, safety programs and the fact that the Congress of the United States has failed to specify its legal status necessitates judicial determination at this time.

The Congress of the United States failed to specifically exempt by name or by other reference, the Red Cross in its 1960 amendments to the *Federal Unemployment Tax Act, Title 26, U.S.C. Section 3305, 3306,* and the District Court has based its exemption of the Red Cross by reference to testimony at a Congressional Committee hearing precluding the enactment of said amendments, which otherwise make no reference to the Red Cross.

The Red Cross was not barred from commencing a suit for a refund of taxes in the state courts of Colorado, in fact it is specifically afforded a remedy under *Section 82-9-9, Colorado Revised Statutes, 1963* to apply for a refund with the Department of Employment, and upon denial thereof, it is entitled by this provision to commence its action in the District Court in and for the City and County of Denver, State of Colorado requesting a judicial determination as to its entitlement of refund, if any. It is respectfully submitted that because of its sovereignty, the State of Colorado cannot be sued, nor may process be issued without its consent in a Federal District Court. *(U.S.C. Constitution Amend. 11) State of Missouri vs. Fiske, 54 Supreme Court 18, 290 U. S. 18.* The consent of the State to be sued in its own Court will not permit suit

in a federal court. *Petty vs. Tennessee-Missouri Bridge Commission, 79 S. Ct. 785, 359 U.S. 275, 3 L. Ed' 804.*

The Congress of the United States in creating the Red Cross gave it permission to sue and be sued in its own name. *(Title 36, U.S.C., Section 2).* Under no federal statute is it allowed to sue either on behalf of the United States government or as a federal agency. It has no special status except "Citizen of Another State" as provided in *Amend. 11* of the *United States Constitution.* The Red Cross attempted to confer original jurisdiction on the District Court joining the United States as a party plaintiff, however, the sole attempt made by the United States to state a claim for relief was set forth in paragraph 12 of the Complaint; such allegations were immaterial to the claim of the Red Cross and by themselves did not state a claim for relief. The Appellee failed to show that the United States was entitled to any relief nor did the United States make any demands for any form of judgment to which the United States as a plaintiff to this suit in the District Court was entitled.

It is submitted where the jurisdiction of the federal court is invoked on the basis of diversity of citizenship as the Red Cross did in this instance, a suit to which the state has closed its doors or limited its jurisdiction may not be maintained in a federal district court in that state. *Woods vs. Interstate Realty Company, 69 S. Ct. 1235, 337 U.S. 535; State of Missouri vs. Fisk,* supra. In addition, if the state statute prescribes a particular mode of review of administrative action or decision, the Red Cross must, if aggrieved by the decision of the administrative agency, seek a judicial review in a manner prescribed and may not

invoke the original jurisdiction of another court by an independent proceeding.

Where a public instrumentality is created with the right to sue and be sued in its own name the states waiver of immunity from suit in the particular case may be restricted to suits or proceedings of a special character in the state court, not in the federal court. *Petty vs. Tennessee-Missouri Bridge Commission,* supra. A clear showing of a state's consent to a suit against itself in the federal courts of fiscal claims is required since the state has a right to reserve for its courts the primary consideration and decision of its own tax litigation because of the direct impact of such litigation upon its finances. A state must clearly declare its consent to be sued in the federal courts before the federal court should under-take adjudication of the claims of a taxpayer against the state. *Kennecott Copper Corp. vs. State Tax Commission, S. Ct. 745, 327 U.S. 573, 90 L. Ed.' 862.*

Assuming arguendo, that the Appellee was an instrumentality of the United States and that original jurisdiction of this suit was not vested in the State District Court in and for the City and County of Denver, State of Colorado, there still remains the question of what court has original jurisdiction of this case. Where the party or one of the parties bringing the suit is the United States and the Defendant is the State of Colorado, as would be the situation here, and is evidenced by the decision of the District Court (see Appendix A), it is submitted that the Supreme Court and only this Court would have original jurisdiction. *U.S.C. Constitution, Article 3, Section 1, Section 2, cls. 1, 2.; Title 28 U. S. C. Section 1251; United States vs. State of California, 328 Fed.' 729, Cert. denied*

85 S. Ct. 34, 379 U.S. 817, 13 L. Ed.² 29. Moreover, the original jurisdiction of the Supreme Court extends to suits by the United States against the state without regard to the subject of such controversies. *U.S. vs. Texas, 143 U.S. 621, 12 S. Ct. 488, 36 L. Ed.² 285.*

The Department of Employment does not quarrel with the premise that the purpose of the Red Cross is noble and beneficial to citizens of the United States as well as those throughout the world; however, the fact that this organization has rendered assistance to the armed forces as well as other federal agencies does not per se make this organization an instrumentality of the United States government. The evidence in the record submitted to the Supreme Court is undisputed, that the Red Cross as a member of the International Red Cross is required by the latter's charter to remain independent from any government.

In one of the exhibits introduced into evidence by the Red Cross *(Annual Report 1946 American National Red Cross, page 20.)* its former chairman, Basil O'Connor stated very explicitly that the Red Cross, while cooperating closely and cordially with its own government and agencies, should at the same time remain independent from them; that the Red Cross was in no sense a part of the government.

The evidence is undisputed that the Red Cross is solely dependent upon private funds and endowments for its support; a majority of its operations and purposes are private in nature; it retains private legal counsel; subjects itself to various state controls and other forms of state taxation; it has an independent governing body; it may

hold property in its own name; and that it shall be required to reimburse the U. S. Department of Defense for audits made *(Title 36 U.S.C. Section 7.)*.

The Red Cross asserts that it is a federal instrumentality because of the assistance rendered to the United States Department of Defense and the statutory recognition given it by the Congress of the United States in this regard. However, for such purposes, the Congress has specifically provided that the Red Cross employees should not be considered as federal employees *(Title 10, U.S.C., Section 2602 (e))*. In two separate legislative acts, the Congress has specifically provided; (1) that employees of the Red Cross are not to be considered to be federal employees and that (2) Red Cross is not to be considered a federal agency. *(Title 42, U.S.C., Section 1855 (a))*. In no instance, has the Congress specifically provided that the Red Cross should be considered as an agency or an instrumentality of the United States government.

Assuming arguendo, that the Red Cross is a federal instrumentality, it is submitted that the Congress of the United States has waived its immunity from taxation in the 1960 amendments to the *Federal Unemployment Tax Act*, supra. The Congress has enabled those states who have enacted such legislation to tax federal instrumentalities *(Title 26 U.S.C., Section 3305 (b))* subject to certain exceptions contained in *Title 26, U.S.C., Section 3306 (c) (6)*, supra.

Title 26, U.S.C. 3305 (b) provides in part as follows:

"(b) *Federal Instrumentalties in General.* The legislature of any state may require any instrumentality of the United States, (other than an instrumentality to

which Section 3306 (c) (6) applies) any individual and its employee, to make contributions to an unemployment compensation law**."

Title 26, Section 3306 (6) being the exception to this waiver of immunity was amended in 1960 by Congress to provide as follows:

"(6) Service in the employment of the United States government or of an instrumentality of the United States which is—

(A) Wholly or partially owned by the United States, or

(B) Exempt from the tax imposed by Section 3301 by virtue of any provisions of law which specifically refers to such section (or the corresponding section of prior law) in granting such exemptions;"

The only exception to this waiver of immunity relates to services performed in the employ of the United States government, or its instrumentality. This exception would, therefore, not apply to the Red Cross because the Congress has by previous legislation, specifically provided that employees of the Red Cross are not employees of the United States. *(Title 10 U.S.C. Section 2602 (e)).* Construing these two statutes together it is respectfully submitted that the Congress has made it abundantly clear that if employees of the Red Cross are not employees of the United States government, their services are not performed in the employ of the United States government or an instrumentality thereof, and as a result the Red Cross is not covered by the 1960 amendments to the *Federal Unemployment Tax*

Act. This basic obstacle must be resolved before consideration can be given to sub-paragraphs (A) and (B). The District Court failed to make a factual fining as to whether services performed by Red Cross were performed in the employ of the United States, or its instrumentality.

The Red Cross does not contend that it is wholly or partially owned by the United States, therefore, the sole remaining consideration is directed to sub-paragraph (B). The District Court held that requirements of sub-paragraph (B) were met by the fact that *Title 26, U.S.C., Section 3306 (8)* specifically applied to *Section 3301,* supra.

The District Court referred to the testimony given in a committee hearing of the Congress of the United States ruling that this constituted specific reference of the Red Cross in the 1960 amendments to the *Federal Unemployment Tax Act, (Section 3305, 3306, supra.)* however, Congress failed to make specific reference to the Red Cross in its final legislation. There is no ambiguity so far as these 1960 amendments are concerned, therefore, there was no reason to construe the legislative intent by reviewing testimony given in legislative committee hearings, conducted prior to final passage.

It is submitted that the District Court failed to properly interpret the clear intent of the Congress of the United States in waiving immunity otherwise granted federal instrumentalities under the constitution of the United States; the American Red Cross is a large organization whose legal status has yet to be resolved upon appeal.

Together with the United States of America they have

filed suit, contending that one is an agency or instrumentality of the other, against a sovereign state for refund of a large amount of taxes paid; the Appellant contends that this was a just and proper tax and that the Appellee Red Cross should be subjected to further taxation in keeping with the legislative intent of the Congress of the United States and the Colorado legislature. United States of America and the Red Cross invoked jurisdiction in a United States District Court which if allowed to stand would create a new procedural precedent. By its decision, the District Court has cloaked the Red Cross with the stature of a federal instrumentality which will have for reaching effect not only upon the Appellant, State of Colorado but other states, political subdivisions and citizens as well. We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 8233

THE AMERICAN NATIONAL RED CROSS,
Plaintiff,
vs.
DEPARTMENT OF EMPLOYMENT, and BERNARD E. TEETS, EXECUTIVE DIRECTOR OF EMPLOYMENT OF THE DEPARTMENT OF EMPLOYMENT,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The plaintiff appeared by William Massar, Esquire, of the Department of Justice, Washington, D. C., John L. Currin, Esquire, of the General Counsellor's Office of The American National Red Cross, Washington, D. C., and Jack D. Henderson, Esquire, First National Bank Building, Denver, Colorado; the defendants appeared by James D. McKevitt, Esquire, Assistant Attorney General, Denver, Colorado.

This matter came on for trial to this District Court of three judges on June 30, 1965. The Court heard the evidence and argument of counsel and is now duly advised.

This is an action by the United States and the American National Red Cross, hereinafter referred to as "Red Cross", against the Department of Employment of the State of Colorado and its Executive Director, hereinafter referred to as the "Department".

The action seeks to have the Colorado Employment Security Act, Chapter 82 Colorado Revised Statutes 1953, declared inapplicable to the Red Cross and seeks a refund of all sums collected under the Act from the Red Cross.

Briefly stated the contentions of the parties are as follows:

Plaintiffs contend that Red Cross is an instrumentality of the United States, and as such is immune from taxation by Colorado, and Congress has not waived that immunity.

Defendants contend that the Red Cross is not an instrumentality of the United States and in any event, Congress has, by the 1960 amendments to the Federal Unemployment Tax Act, waived whatever immunity Red Cross had with respect to the application of the Colorado Employment Security Act.

The issues as set forth in the pre-trial order are as follows.

1. Whether Red Cross and its chapters are instrumentality or instrumentalities or agency or agencies of of the United States.
2. Whether Congress by the 1960 amendments to the Federal Unemployment Tax Act has waived Red Cross' constitutional immunity from the application of the Colorado Employment Security Act.
3. Whether the Chapters in Colorado of The American National Red Cross are each juridicial entities separate and apart from each other and from plaintiff, The American National Red Cross.

4. Whether plaintiff is precluded from obtaining relief in this Court because it has not brought suit in the District Court for the City and County of Denver as provided for in Section 82-9-9 of the Act.

5. Whether Red Cross is entitled to interest on any refunds which may be granted by this Court.

There is little dispute as to the facts. The pre-trial order contains the following statement of uncontroverted facts:

1. Plaintiff The American National Red Cross (hereinafter sometimes referred to as "Red Cross") is organized and exists by virtue of an act of the Congress of the United States of America (Title 36 USC Sec. 1 et. seq.) which provides that it is a body corporate and politic in the District of Columbia. Red Cross does not have its principal place of business in the State of Colorado.

2. The United States of America is a corporate sovereign and body politic.

3. Defendant Department of Employment (hereinafter sometimes referred to as "Department") is an agency of the State of Colorado, charged with the function of administering the Employment Security Act of the State of Colorado (Colorado Revised Statutes 1953, as amended, Chapter 82) hereinafter referred to as the "Act".

4. Defendant Bernard E. Teets is the Executive Director of Employment and as such is head of the Department.

5. The Department determined that employment in

Colorado was subject to the Act and demanded that payment by Red Cross and certain of its chapters be made of the contributions and interest provided for by the Act.

6. Thereafter and prior to the commencement of this action, payments aggregating more than $10,000 were made involuntarily and under protest to defendants. Part of said payments was forwarded from the office of The American National Red Cross in Washington, D.C. and parts were forwarded from the offices of various Red Cross chapters located in Colorado. The parts forwarded by any one such office did not aggregate $10,000.

7. Each of said payments was accompanied by an application for refund, each of which was denied by defendants prior to the commencement of this action.

8. The American National Red Cross is a charitable organization described in 26 USC Section 501 (c) (3) and exempt from United States Income Tax under Title 26 USC Section 501 (a).

9. Defendants claim that if Red Cross does not make payments which they claim continue to become due under the Act, Red Cross will be subject to the penalties, interest charged and remedies for collection of contribution, interest and penalties provided for by the Act.

10. Colorado Law does not provide for interest with respect to refunded contributions under the Act.

In addition, it was admitted by the defendants at the trial that the local chapters of the Red Cross have no legal

entity apart from the plaintiff, The American National Red Cross.

The Court incorporated in its findings of fact the foregoing uncontroverted facts and admission, and in addition thereto finds the following facts.

The Red Cross' charter designates it as the organization authorized to act in matters of relief under the Treaties of Geneva and to perform all duties devolved upon a national society by each nation which has acceded to any of said treaties or conventions.

In addition, it is authorized to act in matters of voluntary relief and as a medium of communication between the people of the United States and their armed forces.

By the provisions of Title 10 United States Code, § 2602, the President may accept the cooperation and assistance of the Red Cross and employ it under the armed forces under regulations to be prescribed by the Secretary of Defense, and pursuant to this statute the President has so utilized the Red Cross.

The Red Cross is the authorized agency for communication with prisoners of war held by unfriendly governments.

In addition to these services performed for and on behalf of the United States Government, the Red Cross is also authorized to and does carry on a system of national and international relief in time of peace and apply the same in mitigating the sufferings caused by pestilence, fire, famine, floods, and other great national calamities, and devise and carry on measures for preventing the same.

CONCLUSIONS OF LAW

The Court concludes it has jurisdiction of the subject matter of this action and of the parties thereto.

The Court concludes that the local chapters of The American National Red Cross are not separate legal entities but are integral parts of the plaintiff The American National Red Cross.

The Court concludes that The American National Red Cross is an instrumentality of the United States, and as such is immune from taxation under the Colorado Employment Security Act, unless that immunity has been waived by the 1960 amendments to the Federal Unemployment Tax Act.

The Court concludes that the United States of America has a legal interest in this litigation and is a proper party plaintiff to this action.

The Court concludes that the 1960 amendments to the Federal Unemployment Tax Act do not waive the immunity of the Red Cross from taxation under the Colorado Employment Security Act.

The reasons for the Court's conclusions in the latter respect are as follows:

The Federal Unemployment Tax Act (Chapter 23 of Title 26 U.S.C.) imposes a federal tax upon employment to provide a fund for unemployment compensation. However, the act recognizes the right of the states to provide and administer a fund for the same purpose under state

law, and the contributions made by employers to the state fund are by the federal act made a credit against the federal tax (see §§ 3301 and 3302).

Although instrumentalities of the United States have a constitutional immunity from state taxation, § 3305(b) of the Federal Unemployment Tax Act waived that immunity as to some instrumentalities of the United States. Prior to the 1960 amendments to the Federal Unemployment Tax Act, § 3305(b) read in its essential parts as follows:

> "The legislature of any State may require any instrumentality of the United States (except such as are (1) wholly owned by the United States, or (2) exempt from the tax imposed by section 3301 by virtue of any other provision of law)....., to make contributions to an unemployment fund under a State unemployment compensation law.....".

The Red Cross came within the provisions of the second exemption, being an instrumentality of the United States which was exempt from the tax imposed by § 3301 by virtute of § 3306(c) (8), which exempted from the taxes imposed by § 3301 service performed in the employ of a corporation organized and operated for charitable purposes.

However, by the 1960 amendments to the Federal Unemployment Tax Act, § 3305(b) was amended to read in its essential parts as follows:

> "The legislature of any State may require any instrumentality of the United States (other than an instrumentality to which section 3306(c) (6) applies

> .....to make contributions to an unemployment fund under a State unemployment compensation law .....".

In other words, the Congress did not waive the immunity from state taxes of instrumentalities of the United States to which § 3306(c) (6) applies.

§ 3306(c) (6), as amended by the 1960 amendments, "applies to an instrumentality of the United States which is

> "exempt from the tax imposed by section 3301 by virtue of any provision of law which *specifically refers to such section*.....". (Emphasis added).

Subdivision (8) of § 3306(c), as amended by the 1960 amendments, is a "provision of law" which exempts from the tax imposed by § 3301

> "service performed in the employ of a religious, charitable, educational, or other organization described in section 501(c) (3) which is exempt from income tax under section 501(a)".

Admittedly The American National Red Cross is such an exempt organization. There remains then only the question of whether or not subdivision (8) of § 3306(c) as amended in 1960 "specifically refers to" § 3301.

§ 3301 imposes a tax on employment. § 3306(c) (8) provides that the employment described in subdivision (8) is not employment for the purposes of the Federal Unemployment Tax Act. This is only another way of saying that the employment described in § 3306(c) (8) is exempt from the taxes imposed by § 3301.

The Court concludes that § 3306(c) (8) "specifically refers to" § 3301 and that the Red Cross is exempt not only from the taxes under the Federal Unemployment Tax Act but also is immune from taxation under the Colorado Employment Security Act.

This it was the intent of the Congress that the 1960 amendments should not subject the Red Cross to either State or Federal unemployment taxes is evident from the following quotation from the legislative history found at page 12797 of Volume 106, No. 115 of the Congressional Record of Proceedings and Debates of the 85th Congress, Second Session, held on June 22, 1960, wherein Congressman Ikard, in clarification of the purposes of the 1960 amendments here under consideration, stated:

> "The American National Red Cross has for many purposes been regarded as an instrumentality of the Federal Government. However, its exemption from Federal unemployment taxes is presently based on that provision of the statute which specifically exempts service performed in the employ of certain charitable corporations from such taxes. H.R. 12580 continues the exemption from unemployment taxes for such charitable corporations; hence the bill is not intended to remove the Red Cross' current exemption. Similarly, it is not the intention of the bill to remove the present exemption of Red Cross employment from State unemployment taxation."

The Court concludes that the Red Cross is not precluded from obtaining relief in this court because it has not brought suit in the District Court for the City and County of Denver as provided in § 82-9-9, Colorado Revised Statutes 1953.

The Court concludes that the Red Cross is entitled to judgment against the defendants for the amounts which it and its various chapters have paid to the State of Colorado under the Colorado Unemployment Security Act, but the Red Cross is not entitled to recover any interest thereon.

IT IS ORDERED that this matter is continued for 10 days from this date for the filing of a stipulation of the parties as to the amount for which judgment should be entered. Upon the filing of the stipulation, the Clerk of the Court shall forthwith enter judgment in favor of The American National Red Cross and against the defendants in the amount stipulated.

DATED at Denver, Colorado, this 8th day of September, 1965.

BY THE COURT:

OLIVER SETH
United States Circuit Judge

ALFRED A. ARRAJ
United States District Judge

HATFIELD CHILSON
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 8233

THE AMERICAN NATIONAL RED CROSS,

Plaintiff,

vs.

DEPARTMENT OF EMPLOYMENT, and BERNARD E. TEETS, EXECUTIVE DIRECTOR OF EMPLOYMENT OF THE DEPARTMENT OF EMPLOYMENT,

Defendants.

SUPPLEMENTAL CONCLUSIONS OF LAW AND JUDGMENT

It having been called to the Court's attention that the conclusions of law entered by the Court on September 8, 1965, concluded that The American National Red Cross was entitled to a judgment against the defendants for the amounts which it and its various chapters have paid to the State of Colorado under the Colorado Employment Security Act, but the Court made no determination as to the prayer for injunctive relief.

The Court therefore makes the following supplemental conclusions of law, to-wit:

The Court concludes that the Red Cross is entitled to a permanent injunction enjoining the defendants and their officers, agents, servants, employees, and attorneys from assessing or collecting any contributions, interests, or penalties under the Employment Security Act of the State of Colorado, Chapter 82 of the Colorado Revised Statutes 1953, as amended, against or from the plaintiff, The American National Red Cross.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the defendants, Department of Employment and Bernard E. Teets, Executive Director of Employment of the Department of Employment, and their officers, agents, servants, employees, and attorneys are permanently enjoined from assessing or collecting any contributions, interest, or penalties against or from the plaintiff, The American National Red Cross, under the Employment Security Act of the State of Colorado, Chapter 82 of the Colorado Revised Statues 1953, as amended.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff, The American National Red Cross, have judgment against the defendants in the sum of $27,927.79 and the plaintiff's costs to be taxed by the Clerk of the Court.

DATED at Denver, Colorado, this 15th day of September, 1965.

BY THE COURT:

OLIVER SETH
United States Circuit Judge

ALFRED A. ARRAJ
United States District Judge

HATFIELD CHILSON
United States District Judge

APPENDIX B

1. Title 10 U.S.C. Section 2602 (e), 67 Stat. 178, 179 is set forth as follows:

   American National Red Cross: cooperation and assistance *** (e) For the purposes of this section, employees of the American National Red Cross may not be considered as employees of the United States.

2. Title 26 U.S.C. Section 3301, 74 Stat. 980 is set forth as follows:

   There is hereby imposed on every employer (as defined in section 3306 (a)) for the calendar year 1955 and for each calendar year thereafter an excise tax, with respect to having individuals in his employ, equal to 3 percent of the total wages (as defined in section 3306 (b)) paid by him during the calendar year with respect to employment (as defined in section 3306 (c)) after December 31, 1938.

3. Title 26, U.S.C. Section 3305 (b), 74 Stat. 983 is set forth as follows:

   (b) Federal instrumentalities in general. — The legislature of any State may require any instrumentality of the United States (other than an instrumentality to which section 3306 (c) (6) applies), and the individuals in its employ, to make contributions to an unemployment fund under a State unemployment compensation law approved by the Secretary of Labor under section 3304 and (except as provided in section 5240 of the Revised Statutes, as amended (12 U.S.C., sec. 484), and as

modified by sub-section (c)), to comply otherwise with such law. The permission granted in this subsection shall apply (A) only to the extent that no discrimination is made against such instrumentality, so that if the rate of contribution is uniform upon all other persons subject to such law on account of having individuals in their employ, and upon all employees of such persons, respectively, the contributions required of such instrumentality or the individuals in its employ shall not be at a greater rate than is required of such other persons and such employees, and if the rates are determined separately for different persons or classes of persons having individuals in their employ or for different classes of employees, the determination shall be based solely upon unemployment experience and other factors bearing a direct relation to unemployment risk; (B) only if such State law makes provisions for the refund of any contributions required under such law from an instrumentality of the United States or its employees for any year in the event such State is not certified by the Secretary of Labor under section 3304 with respect to such year; and (C) only if such State law makes provision for the payment of unemployment compensation to any employee of any such instrumentality of the United States in the same amount, on the same terms, and subject to the same conditions as unemployment compensation is payable to employees of other employers under the State unemployment compensation law.

4. Title 26 U.S.C. Section 3306 (c) (6) (8), 74 Stat. 983, 984, 986 is set forth as follows:

(c) Employment. — For purposes of this chapter, the term "employment" means any service performed prior to 1955, which was employment for purposes of subchapter C of chapter 9 of the Internal Revenue Code of 1939 under the law applicable to the period in which such service was performed, and any service, of whatever nature, performed after 1954 by an employee for the person employing him, irrespective of the citizenship or residence of either. (A) within the United States, or (B) on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aircraft when outside the United States, except—***

(6) service performed in the employ of the United States Government or of an instrumentality of the United States which is —

(A) wholly or partially owned by the United States, or

(B) exempt from the tax imposed by section 3301 by virtue of any provision of law which specifically refers to such section (or the corresponding section of prior law) in granting such exemption; ***

(8) service performed in the employ of a religious, charitable, educational, or other organization de-

scribed in section 501 (c) (3) which is exempt from income tax under section 501 (a); ***

5. Title 36 U.S.C. Section 2, 61 Stat. 81, is set forth as follows:

The name of this corporation shall be "The American National Red Cross", and by that name it shall have perpetual succession, with the power to sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States; to have and to hold such real and personal estate as shall be deemed advisable and to dispose of the same, to accept gifts, devises, and bequests of real and personal estate for the purposes of this corporation hereinafter set forth; to adopt a seal and the same to alter and destroy at pleasure; and to have the right to have and to use, in carrying out its purposes hereinafter designated, as an emblem and badge, a Greek red cross on a white ground, as the same has been described in the treaties of Geneva, August twenty-second, eighteen hundred and sixty-four and July twenty-seventh, nineteen hundred and twenty-nine, and adopted by the several nations acceding thereto; to ordain and establish bylaws and regulations not inconsistent with the laws of the United States of America or any State thereof, and generally to do all such acts and things as may be necessary to carry into effect the provisions of sections 1, 2, 3, 4a—6, 8 and 9 of this title and promote the purposes of said organization; and the corporation created is designated as the organization which is authorized to act in matters of relief under said treaties. In accordance with the said treaties, the delivery of the

brassard allowed for individuals neutralized in time of war shall be left to military authority.

6. Title 36 U.S.C. Section 7, 67 Stat. 179, is set forth as follows:

The American National Red Cross annually shall reimburse the Department of Defense for auditing its accounts, and the sum so paid shall be covered into the Treasury of the United States as a miscellaneous receipt.

7. Title 42 U.S.C. Section 1855 a., 64 Stat. 1109, is set forth as follows:

As used in this chapter, the following terms shall be construed as follows unless a contrary intent appears from the context:***

(f) "Federal agency" means any department, independent establishment, Government corporation, or other agency of the executive branch of the Federal Government, excepting, however, the American National Red Cross.

Colorado Revised Statutes, 1963

8. Section 82-1-3 (8) (e), is set forth as follows:

Definitions.—As used in this chapter, unless the context clearly requires otherwise:***

(8) The term "employment" shall not include:***

(e) Service performed in the employ of the United States government, or a national bank or state bank which is a member of the federal reserve system, or a federal savings and loan association or a state building and loan association which is a mem-

ber of the federal home loan bank system, which institutions were, prior hereto, exempt from this chapter, or any other instrumentality of the United States exempt under the constitution of the United States from the contributions imposed by this chapter, except that to the extent that the congress of the United States shall permit states to require any instrumentalities of the United States to make payments into an unemployment fund under a state unemployment compensation law, all of the provisions of this chapter shall be applicable to such instrumentalities, and to services performed for such instrumentalities, in the same manner, to the same extent and on the same terms as to all other employers, employing units, individuals and services; provided that if this state shall not be certified for any year by the federal security agency under section 1603(c) of the federal internal revenue code, the payments required of such instrumentalities with respect to such year shall be refunded by the department from the fund in the same manner and within the same period as is provided in section 82-9-9 with respect to contributions erroneously collected.

Colorado Revised Statutes, 1963

9. Section 82-9-9, is set forth as follows:

Refunds.—(1) An employing unit may file a written application for refund of money paid erroneously, and if the department shall determine that such payment, or any portion thereof, was paid erroneously, the department shall either issue to the employing unit a credit memo therefor, or make a refund thereof, in either event without in-

terest thereon. In no event may an employing unit recover money paid erroneously, or other wise, which has been paid prior to the first day of January of the first year of the two calendar years immediately preceding the date of the filing of the application for refund. If such application for refund is refused, or if no final action is taken thereon within six months, an employing unit may commence an action in the district court for the city and county of Denver for the collection thereof. In the event of court action no recovery of any money paid prior to the first day of January of the first year of the two calendar years immediately preceding the date of the filing of the application shall be allowed. For like cause and for the same period a recovery as above indicated may be allowed on the department's own initiative.***

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1071

DEPARTMENT OF EMPLOYMENT AND BERNARD E. TEETS, EXECUTIVE DIRECTOR OF EMPLOYMENT OF THE DEPARTMENT OF EMPLOYMENT, APPELLANTS

v.

THE UNITED STATES OF AMERICA, AND THE AMERICAN NATIONAL RED CROSS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

MOTION TO AFFIRM

Pursuant to Rule 16(1) of the Revised Rules of this Court, appellees move to affirm the judgment of the district court.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court (Jur. St. 18–29) enjoining appellants, on constitutional grounds, from collecting State unemployment taxes from the American National Red Cross ("Red Cross") and directing them to refund the taxes previously collected. The Colorado Employment Security Act requires employers,

including charitable organizations, to pay to the Colorado unemployment fund annual taxes measured by wages paid to employees. 4 Colorado Rev. Stat. Ann. (1963) 82-6-1. The district court found that the Red Cross is "an instrumentality of the United States, and as such is immune from taxation under the Colorado Employment Security Act" and that "the 1960 amendments to the Federal Unemployment Tax Act do not waive the immunity of the Red Cross from taxation" (Jur. St. 23).

ARGUMENT

The decision of the district court is plainly correct, and the questions presented are not sufficiently important to warrant plenary consideration by this Court.

1. Although this Court has never passed on the principal question presented by appellants—*i.e.*, whether the Red Cross is an instrumentality of the United States (Jur. St. 9–14)—there is no conflict of opinion among the few courts which have had occasion to consider the question. Moreover, repeated congressional and Presidential statements leave no doubt that the Red Cross is an arm of the federal government engaged in the performance of governmental functions. It, therefore, no less than national banks, is a tax-immune instrumentality of the United States.

The Red Cross, whose genesis goes back to the society founded in 1881 under the leadership of Clara Barton, now exists and is organized under the Act of January 5, 1905, c. 23, 33 Stat. 599, as amended

(36 U.S.C. 1, *et seq.*) The purposes of the Act, as appears from its preamble and its body, were to reincorporate the then-existing society, place it under government supervision, and establish the Red Cross as the official organization through which the government would discharge its obligations under the Red Cross Treaty of 1864.[1] After the Red Cross Treaty of 1929,[2] Section 3 First of the Act of 1905 was amended to embrace that treaty and "any other treaty or convention similar in purpose to which the United States of America may hereafter give its adhesion." Act of May 8, 1947, c. 50, 61 Stat. 80. Thus the Red Cross is now also the organization through which the government discharges its obligations under the Geneva Convention for the Multilateral Protection of War Victims, August 12, 1949, 6 U.S. Treaties, 3114. Governmental supervision is achieved through the appointment by the President of the United States

[1] Geneva Convention of August 22, 1864, for the Amelioration of the Condition of the Wounded in Armies in the Field, 22 Stat. 940 (1882), Treaty Series No. 377. This Treaty, *inter alia*, embodied the first international agreement to provide, through both military and civilian effort, care of wounded and sick combatants, irrespective of their nationality, and for conferring neutral and protected status on ambulances, hospitals, and personnel engaged in aiding and caring for the wounded and sick under the Red Cross emblem.

[2] Geneva Convention of July 27, 1929, for the Amelioration of the Condition of the Wounded and the Sick of Armies in the Field, 47 Stat. 2074 (1932), Treaty Series No. 847. This Treaty revised and extended the Red Cross Treaty of 1864 and more specifically recognized the official and protected status of the voluntary aid (Red Cross) societies duly authorized by their governments to assist in carrying out the latter's treaty obligations.

of eight of the fifty members of the Board of Governors of the Red Cross, one of whom the President designates as the principal officer of the Red Cross and the other seven of whom are required to be "officials of departments and agencies of the Federal Government." Act of January 5, 1905, *supra,* as amended, Sec. 5, 36 U.S.C. 5. Other duties assigned to the Red Cross by the Act of 1905 are (1) to act "as a medium of communication between the people of the United States of America and their Armed Forces" (Sec. 3 Fourth, as amended by the Act of July 17, 1953, c. 222, 67 Stat. 178, sec. 4, 36 U.S.C. 3 Fourth) and (2) "to continue and carry on a system of national and international relief in time of peace and apply the same in mitigating the suffering caused by pestilence, famine, fire, floods, and other great national calamities, and to devise and carry on measures for preventing the same" (Sec. 3 Fifth, 36 U.S.C. 3 Fifth).

Congress has made government land and buildings available to the Red Cross for its national headquarters (Joint Resolution of February 7, 1930, c. 42, 46 Stat. 66; Joint Resolution of June 7, 1924, c. 369, 43 Stat. 665), and has authorized the Secretaries of the military departments to permit the Red Cross to erect or use government buildings on military installations for storage of supplies. 10 U.S.C. 2670. The

work of the Red Cross, however, depends on voluntary contributions of funds and services by private persons.

In short, the Red Cross performs important governmental functions and plays a significant role in fulfilling the duties entrusted to government departments and agencies. See *Standard Oil Co.* v. *Johnson,* 316 U.S. 481, 485; Sturges, *The Legal Status of the Red Cross,* 56 Mich. L. Rev. 1, 30 (1957), and authorities cited therein. See also *Gradall* v. *United States,* 329 F. 2d 960, 964 (Ct. Cl.). Indeed, Congress frequently has recognized the role that the Red Cross plays in performing such functions.[3]

---

[3] The 84th Congress declared in a concurrent resolution (H. Con. Res. 232, 70 Stat. B32):

> Whereas the obligations of this Government and its people under the Treaty of the Red Cross justified the establishment by the Congress of the American National Red Cross as the official agent of this Government to assist in the discharge of such obligations and to engage in other activities for the welfare and relief of the Armed Forces and the prevention and alleviation of human suffering re-

Appellants argue that the Red Cross is not a federal instrumentality because some of its operations are private in nature, it has an independent governing body, its employees are not federal employees, it re-

---

sulting from disasters and emergencies at home and abroad; and

Whereas more than fifty years ago the Congress determined that the work of the American National Red Cross was of such importance to the Government and people of the United States and to the preservation of the dignity of all human beings that provision should be made for its operation under such grant of authority and such Government supervision as would impart official status and thus invite the confidence and support of all the people * * *

In recommending passage of the act which extended the authority of the President to accept the cooperation and assistance of the Red Cross in time of peace as well as in time of war (10 U.S.C. 2602), the Senate Armed Services Committee said (S. Rep. No. 460, 83d Cong., 1st Sess., p. 2):

The American National Red Cross, pursuant to its charter by the Congress of the United States, provides numerous welfare, communication, and recreational services to the Armed Forces of the United States which are not provided by the Armed Forces themselves. These services are concerned directly with individual members of the Armed Forces, and include direct communication with civilian members of service families, emergency loans, and the investigation of health and economic factors pertaining to dependents. The many highly desirable services contributing to the morale and comfort of patients in military hospitals include counseling, recreational activities, an arts and skills service, and other supplementary services. The American National Red Cross is also the authorized agency for communication with prisoners of war held by unfriendly governments. In all instances, when the need arises, the services of the American National Red Cross contribute greatly to the peace of mind and general welfare of the individuals concerned.

tains private counsel and holds property in its own name, and it is dependent upon private funds and endowments for its support (Jur. St. 13–14). Appellants' reliance on those indicia is misplaced, for each is equally present in the case of national banks, which this Court and the Congress have recognized as tax-immune federal instrumentalies ever since *McCulloch* v. *Maryland,* 4 Wheat. 316. See *Owensboro National Bank* v. *Owensboro,* 173 U.S. 664.

The fact that the Red Cross has also been characterized as "independent" for purposes of its membership in the International Red Cross and in statements made by a former Red Cross chairman (Jur. St. 13) does not mean that it cannot be an instrumentality of the federal government for purposes of immunity from local taxation. While delegating governmental functions to the Red Cross, Congress said that it had determined that the Red Cross "should carry out its duties solely by means of the voluntary contributions of funds and services by the people" in order "to preserve and safeguard its impartial, nonpolitical character." H. Con. Res. 232, *supra.*[4]

---

[4] Congress was alert to Red Cross' dependence on voluntary contributions, though it is a federal instrumentality when, in 1944, in revising the provisions dealing with taxes on transportation and communication services, it specifically exempted services furnished to "any corporation created by Act of Congress to act in matters of relief under the Treaty of Geneva of August 22, 1864." Sec. 3469, Internal Revenue Code of 1939, as amended by Sec. 307(a), Revenue Act of 1943, c. 63, 58 Stat. 21. Previously, such services furnished the Red Cross were regarded as exempt under the general exemption for services furnished any government agency. The specific exemptions have been continued in the more recent excise tax revisions. Internal Revenue Code of 1954, Secs. 4253(c), 4263(b) (26 U.S.C. 4253(c), 4263(b)).

Appellant's case is not advanced by their contention (Jur. St. 13) that the Red Cross "subjects itself to various state controls and other forms of state taxation." The contribution here in issue is a tax "on the exercise of the right to employ." *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 508–509; *Cottrell* v. *Teets*, 139 Colo. 558, 561–562, 342 P. 2d 1016, 1018–1019. As in *McCulloch* v. *Maryland*, *supra*, it is "a tax on the operation of an instrument employed by the Government of the Union to carry its powers into execution." 4 Wheat, 316, 436–437. It is not to be confused with a tax on property or with other police regulations to which the Red Cross may constitutionally be subjected. *Thomson* v. *Pacific Railroad*, 9 Wall. 579; *First Nat'l Bank in St. Louis* v. *Missouri*, 263 U.S. 640; *Stewart & Co.* v. *Sadrakula*, 309 U.S. 94. U.S. 94.

2. Appellants also argue that Congress has, by Sections 3305(b) and 3306(c)(6) of the Internal Revenue Code of 1954, as amended by the Social Security Amendments of 1960, 74 Stat. 924, Sec. 531, waived the constitutional immunity of the Red Cross from local unemployment taxes such as those prescribed by the Colorado Act (Jur. St. 14–17). The legislative history of the Social Security Amendments of 1960 makes it plain, however, that this was not Congress' intention.

Section 3305(b) of the Internal Revenue Code of 1954 provides, in pertinent part (emphasis added):

SEC. 3305. APPLICABILITY OF STATE LAW.

* * * * *

(b) *Federal Instrumentalities in General.*—The legislature of any State may require any instrumentality of the United States (*other than an instrumentality to which section 3306 (c)(6) applies*), and the individuals in its employ, to make contributions to an unemployment fund under a State unemployment compensation law * * *.

Section 3306(c), as amended in 1960, provides (emphasis added):

SEC. 3306. DEFINITIONS.

* * * * *

(c) *Employment.* —For purposes of this chapter, the term "employment" means any service * * * except—

* * * * *

(6) service performed in the employ of the United States Government or of an instrumentality of the United States which is—

* * * * *

(B) *exempt from the tax imposed by section 3301 by virtue of any provision of law which specifically refers to such section* (or the corresponding section of prior law) in granting such exemption;

* * * * *

The Red Cross is "exempt from the tax imposed by section 3301" because it is a charitable organiza-

tion within the definition provided by Section 3306 (c)(8), as amended, which exempts "service performed in the employ of a religious, charitable, educational, or other organization described in Section 501(c)(3) which is exempt from income tax under section 501(a)." I.T. 3258, 1939–1 Cum. Bull. 123; Publication No. 78, Internal Revenue Service (Rev. 12–64). The district court concluded that although subsection (8) does not cite Section 3301 by number, it "specifically refers to" such section within the meaning of subsection (6)(B) because its obvious purpose and effect is to exempt employment of the specified kind from the tax imposed by Section 3301 (Jur. St. 25–26).

This construction is clearly what Congress intended in enacting the 1960 amendments. Congressmen Mills and Ikard, who were the Chairman and a member of the House Ways and Means Committee, explained the purpose of Section 531, which amended Section 3306 (c)(6) to include the terms which are relevant here, as follows (106 Cong. Rec. 13827; emphasis added):

> Mr. IKARD. Mr. Chairman, I should like to clarify one particular section of the bill.
>
> Section 531 of the bill—pages 143–146 of H.R. 12580—extends coverage under the unemployment compensation program to employees of certain Federal instrumentalities. The extension will make subject to the Federal unemployment tax any Federal instrumentality which is neither wholly nor partially owned by the United States unless it is exempt from the tax by a specific provision of law. The same section authorizes the legislature of any State

to subject employment by such Federal instrumentalities to the State's approved unemployment compensation tax laws. Examples of the Federal instrumentalities thus to be covered are given on page 55 of the committee report on the bill—House Report No. 1799.

My purpose is to make it clear that there is no intention to extend coverage to an organization which is now exempt as a charitable corporation but which also is a Federal instrumentality neither wholly nor partially owned by the United States. The American Red Cross has for many purposes been regarded as an instrumentality of the Federal Government. However, its exemption from Federal unemployment taxes is presently based on that provision of the statute which specifically exempts service performed in the employ of certain charitable corporations from such taxes. H.R. 12580 continues the exemption from unemployment taxes for such charitable corporations; hence the bill is not intended to remove the Red Cross' current exemption. *Similarly, it is not the intention of the bill to remove the present exemption of Red Cross employment from State unemployment taxation.*

Mr. MILLS. Mr. Chairman, will the gentleman yield?

Mr. IKARD. I yield to the gentleman.

Mr. MILLS. The gentleman has very clearly stated, may I say, the understanding that I have of the bill in this respect. Certainly his statement is a very clear reflection of what was intended as far as I am concerned.

3. Appellants' attack on the district court's jurisdiction rests on the erroneous premise that the basis for federal jurisdiction was diversity of citizenship (Jur. St. 11). Appellees were asserting a federal constitutional claim and seeking an injunction against the enforcement of the State's taxing statute. Consequently, the district court had jurisdiction under 28 U.S.C. 1331. Appellees were not required to exhaust the State's refund remedy because that procedure was not "plain, speedy and efficient."[6] See 28 U.S.C. 1341; *United States* v. *Bureau of Revenue of State of N.M.*, 291 F. 2d 677, 679 (C.A. 10); *United States* v. *Department of Revenue of State of Ill.*, 191 F. Supp. 723, 726 (N.D. Ill.), on remand, 202 F. Supp. 757 (N.D. Ill.), affirmed, 371 U.S. 21; *United States* v. *Livingston*, 179 F. Supp. 9, 12 (E.D. S.Car.), affirmed, 364 U.S. 281. And since the imposition of the tax was asserted to be unconstitutional, appellees were not required to submit to the unlawful exaction and seek a later refund; they were entitled to have the collection of the tax enjoined. Finally, the contention that the Eleventh Amendment barred this suit is patently unsound. *Georgia R. Co.* v. *Redwine*, 342 U.S. 299, 304; *Sterling* v. *Constantin*, 287 U.S. 378, 393; *Ex parte Young*, 209 U.S. 123.

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[6] It should be noted that Colorado courts do not permit the recovery of interest on a refund (R. 75-76, 125). *Brannaman* v. *Richlow Manufacturing Co.*, 106 Colo. 317, 104 P. 2d 897.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 78

DEPARTMENT OF EMPLOYMENT AND
BERNARD E. TEETS, EXECUTIVE DIRECTOR OF EMPLOYMENT
OF THE DEPARTMENT OF EMPLOYMENT, *Appellants,*

VS.

THE UNITED STATES OF AMERICA, AND
THE AMERICAN NATIONAL RED CROSS, *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLORADO

BRIEF FOR THE APPELLANTS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 78

DEPARTMENT OF EMPLOYMENT AND BERNARD E. TEETS, EXECUTIVE DIRECTOR OF EMPLOYMENT OF THE DEPARTMENT OF EMPLOYMENT, *Appellants*,

vs.

THE UNITED STATES OF AMERICA, AND THE AMERICAN NATIONAL RED CROSS, *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of the District Court for the District of Colorado has not been reported. The Findings of Fact and Conclusions of Law and Supplemental Conclusions of Law and Judgment of the District Court are set forth in the Transcript of Record. (R. 20-29).

JURISDICTION

The judgment of the United States District Court For The District of Colorado was entered on September 15, 1965. (R. 20-28).

The jurisdiction of this Court is invoked under 28 U.S.C., § 1253 since the validity of a permanent injunction issued by a District Court of three judges is drawn in question.

The jurisdiction of this Court, having been invoked under 28 U.S.C., § 1253, is thereby predicated upon two factors: (1) that the District Court had jurisdiction over the suit below, and (2) that a three-judge court was required to hear and decide the suit below. Because the jurisdictional questions presented are so integrally related to the question on the merits, the former cannot be answered without some reference to the latter.

The complaint filed by the Red Cross and the United States as parties plaintiff alleged the Red Cross' immunity from taxes imposed by the Colorado Employment Security Act, on the grounds that the Red Cross was an instrumentality of the United States Government and that the enforcement of the tax against the Red Cross was, therefore, an unconstitutional application of that tax statute (R. 1). The defendant's denial of that allegation raised a substantial federal question never before decided by any federal court: Is the American National Red Cross an instrumentality of the United States Government and thereby immune from unemployment taxes levied by a state? The Red Cross alleged its right to such immunity and the State of Colorado's denial thereof clearly created a case arising "under the Constitution, laws, or treaties of the United States," and since the amount in controversy exceeded $10,000 (R. 2), exclusive of interest and costs, the case was within the original jurisdiction of the District Court under 28 U.S.C. § 1331(a), 72 Stat. 415, which provides:

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

The District Court's determination that the Red Cross was an instrumentality of the United States and that the United States itself was a proper party to the suit, also support its jurisdiction under 28 U.S.C. § 1345 which provides:

"Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress."

The Appellants, Colorado Department of Employment and Bernard E. Teets, respectfully disagreed with the Red Cross' allegation in the District Court that it was an instrumentality of the United States and that the United States was a proper party to the suit, and on these grounds the Appellants alleged and contended that the District Court should not have exercised its jurisdiction, but instead should have required the Red Cross to exhaust its plain, speedy and efficient remedy at law (R. 11) as provided by Colorado Revised Statutes §82-9-9 (1963). The Department of Employment and Teets retain these views and contentions on this appeal.

To the extent that this Court may, in ruling upon the merits of this case, uphold some or all of these views and contentions put forth by the Department of Employment

and Teets (as argued later in this Brief), the result very well may be that this Court will find that the District Court erred in exercising its jurisdiction over the suit below. While such a determination that the District Court had no jurisdiction would *ipso facto* remove one of the prerequisites for this appeal (namely, the requirement under 28 U.S.C. § 1253 that the appeal be from a three-judge court of competent jurisdiction), it in no way prevents this Court from considering the merits of this appeal at the present time. Until this Court controverts the District Court's conclusions of law, the jurisdiction of the District Court under 28 *U.S.C.* §§ 1331, 1345, as based on those conclusions, is sufficient to allow a direct appeal to this Court therefrom. The possibility that the interrelationship of the merits questions and the jurisdictional questions may ultimately result in a reversal of the District Court's findings of jurisdiction, should not, under the circumstances, prevent this Court from exercising its jurisdiction at this time in order to decide the very important issue here presented.

In addition to its dependence upon the District Court's having jurisdiction, the Department of Employment's right to bring this appeal under 28 *U.S.C.* § 1253 depends upon whether or not a three-judge court was required in the trial below. In this regard, 28 *U.S.C.* § 2281 provides:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State stat-

utes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

That the case before the District Court was one within the scope of § 2281 is clear from the complaint filed by the Red Cross (R. 1). The Red Cross sought a permanent injunction restraining the action of the Appellant, Bernard E. Teets, Executive Director of Employment of the Colorado Department of Employment, in his enforcement of the Colorado Employment Security Act. The grounds alleged for such injunction was that application of that Act to the Red Cross would be unconstitutional. These facts show that § 2281 is clearly applicable.

Nor can it be argued that § 2281 applies only where the attack on the state officer is based on the invalidity of the underlying statute as a whole; a challenge of the particular application of the statute is sufficient. *Ex Parte Bransford*, 310 U.S. 354, 361; *Oklahoma Gas Co. v. Russell*, 261 U.S. 290, 292; *Herkness v. Irion*, 278 U.S. 92, 93, 94; *Ex Parte Williams*, 277 U.S. 267, 271. This was the situation in the instant case, since the Red Cross did not challenge the Employment Security Act itself as being unconstitutional, but merely challenged the validity of its application to the Red Cross.

The claim of unconstitutionality in the manner in which the statute was being applied posed a "substantial" question, as is required by the interpretation that has been given § 2281, supra (*Great Northern Railway Co. v. Thompson, D.C.N.D.* 1963, 222 F. Supp. 573). The ques-

tion of whether a particular state statutory scheme is contrary to the U.S. Constitution is always a "substantial" one requiring a three-judge Federal District Court. *Penn. Dairies, Inc. v. Milk Control Commission,* 318 U.S. 261; *Public Utilities Commission of California v. United States,* 355 U.S. 534; *United States v. Georgia Public Service Commission,* 371 U.S. 285; *Idlewild Bon Voyage Liquor Corp. v. Epstein,* 370 U.S. 713.

For the reasons stated, it is submitted that a three-judge court was required by 28 U.S.C. § 2281 in the instant case. Additional support for this conclusion is found in *Florida Lime and Avacado Growers, Inc. v. Jacobsen,* 362 U.S. 73, where this Court held that § 2281 requires a three-judge court in all cases where an injunction may be granted against the operation of a state statute on grounds of federal unconstitutionality and *Query v. United States,* 316 U.S. 486, where this Court stated a suit by the U.S. to enjoin enforcement of a state tax statute against an Army Post Exchange on grounds that the Post Exchange was an instrumentality of the United States, was required to be decided by a statutory three-judge court.

Having established the requisite foundation for bringing this appeal, namely, that the District Court had jurisdiction and that a three-judge court was required to hear and determine the application for the injunction, it is submitted that this Court has jurisdiction to hear and determine the merits of this appeal under 28 U.S.C. § 1253, which provides:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order

granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

That such appeals will lie where the suit required the convening of a District Court of three judges is well established. *Rorick v. Bd. of Commissioners of Everglades Drainage District*, 307 U.S. 208; *United States v. Georgia Public Service Commission*, 271 U.S. 285; *Stanback v. Mo Hock Ke Lok Po*, 336 U.S. 368; *Palmetto Fire Ins. Co. v. Connecticut*, 272 U.S. 295.

Perhaps the case most closely on point for establishing the jurisdiction of this Court is *Query v. United States*, 316 U.S. 486, wherein the United States and two Army officers brought suit against the South Carolina Tax Commission to enjoin enforcement of a state tax statute with respect to United States Army Post Exchanges located within the state. The U.S. alleged that post exchanges were instrumentalities of the United States and that imposition of the taxes would interfere with the activities of the United States Government and would be repugnant to the United States Constitution. This Court, in holding that a three-judge federal district court was required to hear the case, said that appeal from a judgment of that court would not lie to the Circuit Court of Appeals, but rather should be brought on direct appeal to the Supreme Court. The *Query* case is precedent for this Court's jurisdiction over the instant case.

It should be noted that since the constitutional claim against Colorado Employment Security Act was substan-

tial, this Court's jurisdiction extends to all of the issues relating to the attack on that Act, whether those additional attacks are based on constitutional grounds or not. *Florida Lime and Avacado Growers, Inc. v. Jacobsen,* 362 U.S. 73, 84; *Public Service Commission v. Brashear Freight Lines,* 312 U.S. 621, 625, note 5; *Railroad Commission of California v. Pacific Gas and Electric Co.,* 302 U.S. 388, 391; *Sterling v. Constantin,* 287 U.S. 378, 393, 394.

For all of the reasons stated above, the Appellants, Department of Employment and Bernard E. Teets, submit that the jurisdiction of the Supreme Court to entertain this direct appeal from the United States District Court for the District of Colorado is well established and extends to all the issues presented.

QUESTIONS PRESENTED

The following questions are presented on appeal to this Court:

1. Whether the Appellee, American National Red Cross is an instrumentality or an agency of the United States.

2. Whether the Appellee, American National Red Cross was precluded from obtaining relief in the United States District Court because it failed to bring its suit for refund of taxes in the State District Court in and for the City and County of Denver, State of Colorado, as required by *the*

Colorado Employment Security Act, Colorado Revised Statutes § 82-9-9 (1963).

and,

3. Assuming arguendo that the American National Red Cross is an instrumentality or agency of the United States, whether the Congress of the United States by its 1960 amendments to the Federal Unemployment Tax Act has waived the constitutional immunity of the Appellee, American National Red Cross from the taxation provision of the *Colorado Employment Security Act, Colorado Revised Statutes* (1963).

STATUTES INVOLVED

The following federal statutes are set forth in Appendix A hereto:

1. 10 U.S.C. Section 2602(a), (e), 70A Stat. 145.
2. 12 U.S.C. Section 5(a), 48 Stat. 147.
3. 12 U.S.C. Section 30, 24 Stat. 18.
4. 12 U.S.C. Section 55, 19 Stat. 64.
5. 12 U.S.C. Section 71(a), 49 Stat. 704, 708.
6. 12 U.S.C. Section 93, 36 Stat. 1167.
7. 12 U.S.C. Section 192, 49 Stat. 721.
8. 12 U.S.C. Section 215(a), 73 Stat. 460.
9. 26 U.S.C. Section 3301, 74 Stat. 980.
10. 26 U.S.C. Section 3305(b), 74 Stat. 983.

11. 26 U.S.C. Section 3306(c)(6),(8), 74 Stat. 983, 984, 986.
12. 28 U.S.C. Section 1253, 62 Stat. 928.
13. 28 U.S.C. Section 1331(a), 72 Stat. 415.
14. 28 U.S.C. Section 1341, 62 Stat. 932.
15. 28 U.S.C. Section 1345, 62 Stat. 933.
16. 28 U.S.C. Section 2281, 62 Stat. 968.
17. 36 U.S.C. Section 2, 61 Stat. 81.
18. 36 U.S.C. Section 3, 67 Stat. 178.
19. 36 U.S.C. Section 5(a)-(c), 61 Stat. 82.
20. 36 U.S.C. Sections 7, 17b, 67 Stat. 179.
21. 42 U.S.C. Section 1855(a), 76 Stat. 111.

The following Colorado statutes are set forth in Appendix A hereto:

1. Colorado Revised Statutes, Section 82-1-3(8)(e) (1963).
2. Colorado Revised Statutes, Section 82-9-9 (1963).

STATEMENT

The Appellee, The American National Red Cross (hereinafter referred to as "Red Cross") is organized and exists by virtue of an Act of the Congress of the United States of America, (*Title* 36 *U.S.C., Section* 1, *et seq.*) which provides that it is a body corporate politic in the District of Columbia. The Red Cross does not have its principal place of business in the State of Colorado.

However, it has a number of chapters in the State of Colorado which employ a considerable number of employees in said state. The Appellant, Department of Employment, is an agency of the State of Colorado, charged with the function of administering the *Colorado Employment Security Act* for the State of Colorado (*Chapter* 82, *Colorado Revised Statutes,* 1963). The Appellant, Bernard E. Teets, is the Executive Director of the Colorado Department of Employment and as such is the head of the Department of Employment.

The State of Colorado is one of three states which taxes non-profit organizations for unemployment taxes under its Employment Security Act. The Department of Employment is also authorized by the Colorado legislature to tax agencies or instrumentalities of the United States government under the provisions of *Section* 82-1-3(8)(e), *Chapter* 82, *Colorado Employment Security Act, Chapter* 82, *Colorado Revised Statutes,* 1963, in instances where immunity is waived by the Congress of the United States.

Prior to the commencement of this suit, the Department of Employment determined that the Appellee, Red-Cross, was subject to the *Colorado Employment Security Act,* supra, and demanded payment of unemployment taxes by the Red Cross and its chapters be made together with interest thereon, provided for by the *Colorado Employment Security Act,* supra.

Thereafter, and prior to commencement of this action, payments aggregating more than $10,000 were made involuntarily and under protest by the Red Cross to the Department of Employment. Each of said payments was accompanied by an application for refund, each of which

was denied by the Department of Employment prior to the commencement of this suit. Subsequent to the denial of the refunds by the Department of Employment, the Red Cross commenced this suit in the United States District Court, for the District of Colorado joining with them the United States of America as a party plaintiff (R. 1).

In its Complaint, the Red Cross alleged that it was an instrumentality of the United States (R. 2), the kind described by 26 *U.S.C., Section* 3306(c)(6)(B), and, as such, continues, because of the express exception made in 26 *U.S.C., Section* 3305(b) to be immune under the United States Constitution from any requirements to make contributions to any state for unemployment compensation taxes (R. 2, 3). The Red Cross further contended that it was an instrumentality of the United States of the kind described by 26 *U.S.C., Section* 3306(b)(6)(B) because of the provisions of 26 *U.S.C., Section* 3306(c)(8), which they contend specifically exempted the Red Cross from taxation under the Federal Unemployment Tax Act (R. 2).

The United States of America was joined as a party plaintiff in this suit under the direction and authorization of its Attorney General because of its interest as sovereign in having *Section* 3305(b) and *Section* 3306(c)(6), supra, properly construed and applied and avoiding infringement of the immunity from state and local taxation, which the United States and Red Cross, as its alleged instrumentality, performing functions essential to the military and civil interests of the United States, allegedly enjoy under the United States Constitution (R. 3).

Subsequent to the filing of the Complaint, the Depart-

ment of Employment moved to strike the United States of America as a party plaintiff (R. 5) and moved to dismiss the Complaint of Red Cross on the grounds that the Court did not have jurisdiction over the subject matter or the parties (R. 5). The Appellees filed a Motion for Summary Judgment contending that the suit was one that the District Court could decide without determination of factual issues and without the need of the Department of Employment filing its Answer (R. 6). The District Court denied the Red Cross Motion for Summary Judgment, granting the motion of the Department of Employment to strike the United States of America as a party plaintiff, and denied the motion of the Department of Employment to dismiss the claim of the Red Cross (R. 9).

Thereafter, the Department of Employment filed its Answer denying that the Red Cross was an instrumentality of the United States government (R. 10) and alleging in the alternative that if the Court found that the Red Cross was an instrumentality of the United States that it was not exempt from taxation under the *Colorado Employment Security Act,* supra, because the Congress of the United States had not specifically exempted it under the provisions of the *Federal Unemployment Tax Act,* 26 *U.S.C., Sections* 3305 *and* 3306 (R. 10). The Appellants in their Answer, as a separate and affirmative defense, alleged that the District Court did not have jurisdiction over the subject matter and that the District Court did not have jurisdiction over the Appellants (R. 11). Upon presentation of evidence and oral arguments, the District Court, sitting as a Three Judge Court, ruled that the United States of America was a proper party plaintiff to

this action, thereby reinstating the United States as a party plaintiff; that the Red Cross was an instrumentality of the United States; and that its immunity as a federal instrumentality had not been waived by the Congress of the United States in its 1960 amendments of the Federal Unemployment Tax Act (R. 20-28).

In its Supplemental Conclusions of Law and Judgment, dated September 15, 1965, the Three Judge District Court permanently enjoined the Department of Employment and its officers, agents, and employees from assessing or collecting any contributions, taxes, interest, or penalties against or from the Red Cross under the *Colorado Employment Security Act,* supra, and rendered judgment in favor of the Red Cross and against the Department of Employment in the sum of $27,927.79, together with the costs of the Red Cross taxed by the Clerk of the District Court (R. 28).

SUMMARY OF ARGUMENTS

The American National Red Cross is not an instrumentality of the United States, and Congress has clearly expressed its intent in this regard. Because the terms "instrumentality" and "agency" are used interchangeably, the provision in the *National Disaster Act* that the Red Cross is not a federal agency is evidence of a Congressional intent that the Red Cross should not be an instrumentality of the United States. This intent is further evidenced by the provision in the original *American National Red Cross Act* itself, where Congress declared that employees of the Red Cross are not to be considered to be employees of the federal government. The voluntary nature of the working relationship between the Red

Cross and the United States, the lack of any supervision or control by the government over the Red Cross, and the fact that more than half of all Red Cross expenditures and activities are directed into private, non-governmental channels, give additional support to the contention that the Red Cross is not a federal instrumentality. Attempts at drawing analogies between the Red Cross, national banks, and Army post exchanges fail to support the Red Cross' argument that it is a government instrumentality. Consideration of such factors as governmental supervision and governmental economic involvement, which caused the courts to find that both national banks and post exchanges are government instrumentalities, clearly leads to an opposite conclusion in the case of the Red Cross. Being neither wholly nor partially owned by the United States, and receiving no financial assistance therefrom, the American National Red Cross is an independent charitable corporation, engaged primarily in private, non-governmental services and governed solely by its own Board of Governors. A state unemployment compensation tax imposed upon such an organization clearly works no hardship upon the government; nor does it materially restrict the activities of the Red Cross in the performance of the services which it does render to government personnel. From all that has been said, it may properly be concluded that the American National Red Cross is not an instrumentality of the United States government.

It is well established, by statute and case law alike, that the Federal District Courts shall not exercise their jurisdiction to enjoin collection of any state tax if there is a plain, speedy and efficient remedy available in the state courts. The *Colorado Employment Security Act* made specific provision for employers to apply for refunds of

tax payments erroneously collected and for the bringing of suit in the state courts if the application should be denied. The Red Cross refused to utilize this state court remedy, alleging that the *Colorado Employment Security Act's* prohibition on the recovery of interest in such a proceeding made the state remedy inadequate. It has been held in a number of well-reasoned decisions that such denial of interest does not, by itself, make the remedy inadequate. Therefore, the District Court erred in exercising its jurisdiction over this matter without first requiring the Red Cross to exhaust its state remedies. Furthermore, the State of Colorado had not waived its sovereign immunity with respect to suits in federal court, and thus, the District Court had no jurisdiction over the Appellant, Department of Employment.

Assuming arguendo, that the Red Cross is an instrumentality of the United States, Congress has nevertheless waived any tax immunity to which it would otherwise be entitled in the instant case. The Red Cross denies the existence of this waiver on the grounds that the Red Cross is included in the class of instrumentalities to which the waiver of immunity does not apply. This contention must fail in the light of the plain meaning of the statutes involved. The Red Cross' argument is ultimately dependent upon a finding that 26 *U.S.C., Section* 3306(*c*)(8) refers specifically to *Section* 3301 of that Title. A careful reading of the statutes reveals that no such specific reference appears therein. At most, there is a broad general reference to the entire chapter in which *Section* 3301 is located. A general reference to an entire chapter will not suffice when a specific reference to a particular section is required. Therefore, the Red Cross' argument must neces-

sarily fail. Nor can legislative history in the form of Congressional debates be resorted to, since the statutes in question are unambiguous and since such debates are totally unreliable as aids in construing a statute.

ARGUMENTS

I.

THE AMERICAN NATIONAL RED CROSS IS NOT AN INSTRUMENTALITY OF THE UNITED STATES, WAS NOT INTENDED BY CONGRESS TO HAVE SUCH STATUS, AND HAS ITSELF DEMONSTRATED THIS FACT BY THE NATURE OF ITS OPERATIONS AND ACTIVITIES.

The term "instrumentality," as it is used to denote a relationship between some person or thing and the United States government, has been used by the courts repeatedly. It is significant to note that "the terms 'Federal agency' and 'Federal instrumentality' are used interchangeably." *Capitol Building and Loan Association v. Kansas Commission,* 83 *P.2d* 106, 111, 148 *Kan.* 446. This Court has itself used the terms interchangeably. *Clallam County v. United States,* 263 *U.S.* 341, 344, 345 (where the Court referred to a corporation alternately as an "instrumentality for carrying on the war . . ." and also as an "agent . . . created . . . for the sole purpose of producing a weapon for the war."). Similarly, in a case where a corporation's relationship to the state government for purposes of tax immunity was contested, the New York Court of Claims implied that the terms "instrumentality" and "agency" were synonomous, both of them contemplating

an entity to which has been delegated the powers necessary to carry out governmental activities. *Ciulla v. State,* 77N.Y.S.2d 545, 550, 191 Misc. 528.

Although Congress has never expressly stated whether or not the Red Cross is an instrumentality of the United States, its intent in this regard is clearly discernable from some of the relevant statutes. Since the terms "agency" and "instrumentality" are considered to be synonomous and interchangeable, it should be noted that Congress, in the *National Disaster Act,* 42 *J.S.C., Section* 1855(*a*), 63 *Stat.* 1109 has provided that the term "Federal agency" does not include the American National Red Cross. Congress could not have expressed itself more clearly than this; the Red Cross is simply not intended to be a United States agency or instrumentality. Furthermore, in a 1953 Amendment to the American National Red Cross Act of 1947, Congress provided that "[E]mployees of the American National Red Cross shall not be considered to be employees of the Federal Government of the United States." (36 *U.S.C., Section* 17(*b*), 67 *Stat.* 179; this provision was repealed in 1956 and replaced with 10 *U.S.C., Section* 2602(*e*), 70*A Stat.* 145, which provides: "[E]mployees of the American National Red Cross may not be considered as employees of the United States." In fact, Red Cross employees receive no federal assistance other than the usual Social Security benefits (R. 108).

If Congress had any intention that the Red Cross should be an agency or instrumentality of the United States, such intent has never been manifested. Quite to the contrary, the only clear intent of Congress which can validly be gleaned from the foregoing statutes is that the Red Cross is not an instrumentality or agency of the

United States. The Secretary of Labor has reached a similar conclusion. Regulations issued by him under the Walsh-Healy Act, regulating contracts made and entered into by, e.g., "instrumentalities of the United States," provide that "the American Red Cross and the Salvation Army are not such agencies or instrumentalities of the United States . . ." 1944-1945 *WH Man., Supplement to Rules and Interpretations, Section* 1, *p.* 1118.

Further indication of Congressional intent can be found by reference to the context in which the American National Red Cross Act is found in the United States Code. The statutes creating the Red Cross and setting forth its purposes are found in *Title* 36, entitled *"Patriotic Societies and Observances."* Other non-instrumentalities created by various sections of that title include: Daughters of the American Revolution, American Historical Association, Boy Scouts, Girl Scouts, American Legion, Grand Army of the Republic, Disabled American Veterans, and Veterans of Foreign Wars. Each of these was created to perform services which Congress believed to be important, and each of them was authorized to carry out those functions. Yet, it would hardly be contended that the Boy Scouts or the American Historical Association are instrumentalities of the United States. Congress apparently considered the organizations created in *Title* 36 to be on an equal plane, having similar legal status as patriotic societies. The similarity of the particular provisions creating each of these organizations bears out this conclusion.

One very significant indication that Congress had no intention of making the Red Cross a federal instrumentality is the fact that it retained no real control over the

Red Cross at the time of its creation. All Red Cross activities and functions are carried out voluntarily, not at the command of the United States. As Mr. Raymond Yingling, Assistant Legal Advisor to the State Department, pointed out in his testimony at the trial below, there is no provision requiring the Red Cross to render services to the armed forces of the United States in the event that it did not voluntarily offer to do so. (R. 58). The important point to be borne in mind is that, although the Red Cross Act sets forth the purposes of the Red Cross, this is merely an "authorization" to perform services; it imposes no "duties" to perform those services. In fact, that Act specifically provides that the Red Cross' purposes shall be: "to furnish *volunteer aid*" to the armed forces and to give "*voluntary* relief" in matters of communication between our military men and their families and friends at home. (36 *U.S.C., Section* 3, 67 *Stat.* 178; Emphasis added) It is submitted that if the Red Cross had, in fact been intended by Congress to be an instrumentality of the United States, there would have been an imposition of duties to perform these services, not a mere authorization to do so voluntarily.

This contention finds support in the fact that the President of the United States has power only to "accept the cooperation and assistance of the American National Red Cross" (10 *U.S.C., Section* 2602(a), 70A Stat. 145) and not the power to order the Red Cross to render such assistance. Nor are Red Cross personnel subject to the commands of United States military officers in the field to any greater extent than any other civilian would be. These facts are more suggestive of an autonomous relationship between the United States and the Red Cross

than they are of the latter's being an instrumentality of the former.

On the domestic scene, during times of national disaster, the Red Cross' working relationship with the United States government is no less independent than it is on the battlefield. All regulations concerning logistical support to disaster areas are determined by voluntarily bilateral agreements between the United States and the Red Cross (R. 84). The Red Cross works only in the private sector, aiding individual victims, while government funds are diverted solely to the public sector (R. 86; 79). No federal funds are appropriated to the Red Cross to assist it in its task. Clearly, a corporation rendering *voluntary* relief to *private* victims from wholly *private* funds cannot be considered to be an instrumentality of the United States.

Instead of being a government instrumentality, the status of the Red Cross is more nearly analagous to that of an independent contractor who enters into bilateral agreements with the United States by tendering his services and having them accepted. It is well-established that "the mere fact that a private corporation conducts its business under a contract with the United States does not make it an instrumentality of the latter." *Buckstaff Bath House Co. v. McKinley,* 308 *U.S.* 358, 362, 363; *Accord, Trinityfarm Construction Co. v. Grosjean,* 291 *U.S.* 466; *Curry v. United States,* 314 *U.S.* 14. Even where the federal government assisted a city in the building of a bridge for purposes of interstate commerce and to assist in military functions, the city's attempt to invoke tax immunity for this limited purpose on grounds of its being a federal instrumentality was rejected by the court; even though

the city had governmental functions, had received governmental funds, and we subject to quasi-governmental supervision. *Miller v. Greenville,* 138 *F.2d* 712. If the city of Greenville was not an instrumentality under those circumstances, much less is the Red Cross capable of having such status, in light of the fact that the latter neither receives government funds nor is it subject to government supervision.

The Appellee, Red Cross, has contended that the power of the President of the United States to appoint eight members of the Board of Governors of the American National Red Cross, including the Chairman thereof, is an indication of Congressional intent to retain governmental supervision over the Red Cross and thereby make it a federal instrumentality. It is respectfully submitted that this contention is unfounded. To be sure, the President does appoint eight Governors, but more importantly, the remaining 42 Governors are elected to their positions, thirty by the various chapters, and twelve by the Board of Governors itself. 36 *U.S.C., Section* 5 (*a*)-(*c*), 61 *Stat.* 82. Furthermore, of the eight Governors appointed by the President, only one, the Chairman, must serve on the executive committee, the group which "when the Board of Governors is not in session, shall have and exercise all the powers of the Board of Governors. . . ." 36 *U.S.C., Section* 5, 61 *Stat.* 82. It is also noteworthy that the requirement that he serve on this committee was imposed by the Red Cross itself in its by-laws (*By-Laws of the American National Red Cross, Section* 3.01), not by Congress. Thus, the Red Cross Act does not itself require that any of the Presidential appointees serve on the executive committee. It was Congress' clear intent that when the Board of

Governors was not in session, the Red Cross could be governed entirely by non-presidential appointees if the Governors so desired.

It is submitted by the Appellants that, since the Red Cross was established as an independent corporation, governed in all matters by a majority vote (R. 102) of its Board of Governors (a substantial majority of which are elected, and not appointed) and by decisions of its executive committee (none of which was required by Congress to be appointed by the President), there is no support for the Red Cross' contention that the mere appointment of eight Governors by the President can be called governmental supervision of Red Cross activities.

The American National Red Cross has itself demonstrated its desire not to become an arm of the government, subject to its control and supervision. In fact, this independent status is expressly required by a provision adopted by the International Red Cross Conference in 1948 (R. 53-54). That provision states one requirement of a national Red Cross society as follows: "Be an institution whose autonomous status allows it to operate in conformity with the fundamental principles of the Red Cross as formulated by the International Red Cross Conference." (R. 53154). The international governing body is quite specifically telling all of the national societies that their membership in the international Red Cross organization requires autonomy from the governments which they serve, and the American National Red Cross has complied completely with these directives.

The American National Red Cross employs *private* certified public accountants to conduct their annual audit

(R. 103) even though the Department of Defense also conducts such an audit. In fact, even the latter audit is paid for entirely with Red Cross funds and is not financed by the government. 36 *U.S.C., Section* 7, 67 *Stats.* 179.

The Red Cross retains *private* general counsel in Washington (R. 103) and local *private* counsel across the country (R. 103). Similarly, it is insured by a *private* insuror (R. 103), and maintains its own retirement and workmen's compensation programs for its employees, who are not included under the federal civil service program (R. 103).

All motor vehicles owned by the Red Cross are titled in the name of the American National Red Cross and bear the license plate of the state in which they are principally operated (R. 105), and all Red Cross drivers are required to have valid drivers licenses from the local state (R. 105). These facts are consistent with the Red Cross' not being an instrumentality of the United States.

In this same vein, it is noted that Red Cross nurses, when they perform services in various states, obtain licenses in those states before they perform those services (R. 109).

In the trial below, the Appellee attempted to draw an analogy between the American National Red Cross, national banks, and Army post exchanges, the latter two having previously been found to be instrumentalities of the United States. *Starr v. O'Connor, C.C.A. Mich.,* 118 F.2d 548, 555; *Query v. United States,* 316 U.S. 486; *Standard Oil Co. of California v. Johnson,* 316 U.S. 481. The reference to national banks is erroneous for two rea-

sons. First, the primary function of national banks is to carry out a governmental function; namely, the maintenance and control of the stability of the national monetary system; the primary function of the Red Cross is not similarly governmental. Less than half of the normal expenditures of the Red Cross are for services to the armed services of the United States (R. 100). A majority of its funds and activities are channeled into such non-governmental functions as private disaster relief, swimming instruction, first-aid classes, nutrition service, blood donor services, etc. Second, the United States government exercises considerable control over national banks. In particular, the various National Bank Acts provide for the cancellation of bank franchises for violation of the provisions of those Acts (12 *U.S.C., Section* 93, 36 *Stat.* 1167) and require that the Comptroller of the Currency approve all consolidations and mergers (12 *U.S.C., Section* 215(*a*), 73 *Stat.* 460), all issuance of preferred stock (12 *U.S.C., Section* 51(a), 49 Stat. 720, and any change of name or location of a national bank (12 *U.S.C., Section* 30, 24 *Stat.* 18). And even more significant, the Comptroller of the Currency may put a national bank into receivership for default in payment of circulating notes (12 *U.S.C., Section* 192, 49 *Stat.* 721), for refusal to pay up impairments in its capital stock (12 *U.S.C., Section* 55, 19 *Stat.* 64), and for violations of provisions concerning directors (12 *U.S.C., Section* 71(*a*), 49 *Stat.* 704, 708). These kinds of governmental controls and supervision are consistent with, and indications of, the fact that national banks are instrumentalities of the United States. Conversely, the lack of any such controls imposed upon the Red Cross is consistent with, and indication of, the fact that the Red Cross is not such an instrumentality. Congress has made

no attempt whatsoever to impose any form of rigid governmental supervision upon the Red Cross, nor were any sanctioning measures established. This further establishes the independent, non-governmental status of the Red Cross.

Just as no valid analogy can be drawn between the legal status of national banks and that of the Red Cross, neither are there any pertinent similarities between Army post exchanges and the Red Cross. Post exchanges have been held by this Court to be instrumentalities of the United States upon the grounds that: 1) Congress has repeatedly made substantial appropriations to such exchanges; 2) money from disbanded exchanges goes into the Federal Treasury; 3) the commanding officer of a post exchange receives his only compensation therefor from the United States Army; and 4) all profits go to improve the general welfare of the armed forces. *Standard Oil Co. of California v. Johnson,* 316 U.S. 484, 485. Applying these particular factors to the Red Cross, it is seen that: 1) Congress has made no appropriations to the Red Cross; 2) no money obtained by the Red Cross goes into the Federal Treasury; 3) Red Cross officials receive no salary from the United States; and 4) profits revert to the general Red Cross fund. Thus, the reasons for finding post exchanges to be federal instrumentalities require an opposite result in the case of the Red Cross, and any attempt at drawing an analogy must necessarily fail. Quite obviously, the decisions holding national banks and post exchanges to be government instrumentalities give more support to Appellants' position.

The American National Red Cross is by no means unique in the kinds of services it performs, either on the

battlefield or on the domestic scene. The Salvation Army has for many years performed similar voluntary relief services, not only to our service men, but to individual victims of local disasters as well. In Veterans Administration hospitals, the Red Cross is "just one of any number of organizations that offer volunteer services . . . ." (R. 108). Other organizations giving similar services include the American Legion, Veterans of Foreign Wars, Disabled American Veterans, etc. And in helping veterans process their claims for government benefits to which they are entitled, not only the Red Cross, but these same other accredited organizations, offer their services (R. 108). The point is simply that the Red Cross, while seeking to invoke a unique legal status, has made no showing of unique servies or activities to support that status or help provide a foundation therefor.

In 1939 the Supreme Court of North Carolina set forth a test for determining whether or not an organization is a governmental instrumentality, and it is submitted that factors listed therein as being determinative are basically sound and logical. *Unemployment Compensation Commission of North Carolina v. Wachovia Bank and Trust Co.*, 2 S.E.2d 592, 596, 215 N.C. 491. The question presented in that case was whether or not a state bank was a federal instrumentality by virtue of its being a member of the Federal Reserve system and the Federal Deposit Insurance Corporation. In holding that the bank was not an instrumentality, and that the North Carolina Unemployment Compensation Act was therefore applicable, the court said:

> "* * * In the borderline cases in which it does not appear that the agency is or is not an instrumentality

> of government, important factors, among others, which must be considered in determining that such agency is an instrumentality of government are: (1) It was created by the government; (2) it is wholly owned by the government; (3) it is not operated for profit; (4) it is primarily engaged in the performance of some essential governmental function; (5) the proposed tax will impose an economic burden upon the government, or it serves to materially impair the usefulness or efficiency of the agency or to materially restrict it in the performance of its duties. * * *"

The court placed particular emphasis on the significance of whether or not the proposed tax would work an economic hardship upon the government, pointing out that if the tax was in fact to be paid out of government money, the agency in question would usually be classed as a government instrumentality. The logic here is sound. The real purpose of governmental immunity from taxation is to prevent undue burdens being placed on the Federal Treasury. Certainly, there is little argument in support of vesting such immunity in an organization whose funds are entirely private.

Considering each of the factors set forth in turn, it is seen that the American National Red Cross was, in fact, created by Congress. 36 *U.S.C., Section* 2, 61 *Stat.* 81. However, that fact alone is by no means sufficient to make an organization an instrumentality of the federal government. Quite to the contrary; although a number of patriotic societies have been created by Congress (36 *U.S.C., Sections* 2-479, 61 *Stat.* 81 *et. seq.*), it would hardly be contended that these societies, such as the Boy Scouts,

American Historical Association, etc., are thereby federal instrumentalities.

Turning then to the remaining three factors, it is seen that the American National Red Cross is neither wholly nor partially owned by the United States.

Furthermore, the testimony given below revealed that the Red Cross' primary function is not the performance of an essential governmental function. Of the four duties imposed upon the local chapters of the Red Cross, only one—giving service to the armed forces—is related to any governmental function, and less than half of the Red Cross budget goes for such services (R. 100). The other three—disaster relief, fund appeals, and interpreting the Red Cross to local communities (R. 100)—are clearly non-governmental functions. This becomes more obvious when it is realized that even the disaster relief programs of the Red Cross are limited to giving assistance to private victims, while the government funds are diverted solely to the public sector. (R. 79). Thus, in times of national disaster, the essential governmental functions and the Red Cross functions are entirely separate. The result is quite simply that the Red Cross' primary function is non-governmental.

With reference to the last factor to be considered—the burden imposed by the tax—it is obvious that since no federal funds whatsoever are paid into the Red Cross treasury (R. 72, 73, 85), there would be no economic burden on the United States by the imposition of the tax provisions of the *Colorado Employment Security Act* against the Red Cross. The major source of the Red Cross' in-

come is the annual appeal to the public, supplemented by earnings of the endowment and general funds (R. 106). To levy a tax to be collected out of such privately collected funds certainly imposes no economic burden on the federal government. Nor is the burden sufficient to impair the Red Cross' efficiency in performing its important services. The Colorado tax is relatively insignificant each year in comparison to annual expenditures of over $133 million (1946 Annual Report of the American National Red Cross, Pl. Ex. 18, p. 168). The Red Cross' ability to render these services would not be materially affected by the very slight burden imposed by the collection of state unemployment compensation taxes.

Thus, although the Red Cross was created by Congress and may be a non-profit organization, the facts remain that it is neither wholly nor partially owned by the government, that its primary function is non-governmental, and that the tax in question would neither burden the government nor impair the Red Cross' effectiveness. These factors are sufficient to establish the Red Cross' status as a non-instrumentality of the United States. The American National Red Cross is an independent, non-governmental organization whose position was eloquently and very accurately set forth by its national chairman, Mr. Basil O'Connor, in 1946:

> "[T]he International Red Cross Committee has always maintained that the national societies, while cooperating closely and cordially with their own governments and with other agencies, would at the same time remain independent.
>
> This explains to a certain extent the unique posi-

tion of the American Red Cross in the life of the country. Cooperating closely with the government, *it is in no sense a part of government;* working hand in hand with many agencies, it still retains its freedom of action . . . (1946 *Annual report of the American National Red Cross, p.* 20; Pl. Ex. 18 (R. 96-97) Emphasis added)"

For the reasons that have been set forth, the Appellants submit that the American National Red Cross is not an instrumentality of the United States, that Congress never intended it to have such status, and that the Red Cross has made every effort to retain its independent nongovernmental status. The humanitarian goals and purposes to which the Red Cross subscribes are respected by all, but even the most humanitarian and charitable organizations must share the burden of tax liabilities legally imposed by proper taxing authorities.

The Red Cross not being an instrument of the United States, it follows that the United States was not a proper party to the proceeding below. Although Federal Rule of Civil Procedure 8(2) specifically requires a statement by the plaintiff showing that he is entitled to relief, the United States' only attempt at stating a claim for relief was set forth in paragraph 12 of the Complaint (R. 3), which merely provided that the United States agreed with the Red Cross in its interpretation of two United States statutes and that it joined in this suit because of its interest in having those statutes properly construed. These allegations were immaterial to the claim of the Red Cross and by themselves did not state a claim for relief. The Appellee failed to show that the United States was en-

titled to any relief, and the United States did not make any demands for any form of judgment to which the United States as plaintiff to this suit in the District Court was entitled. In its brief in opposition to the Appellants' motion to dismiss the United States, the Red Cross contended that the United States need not have a pecuniary interest in the suit, relying variously upon the following cases: *United States v. Fitzgerald,* C.C.A. 8th Cir., 201 Fed. 295; *In re Debs,* 158 U.S. 564; *United States v. New Orleans Pac. Ry. Co.,* 248 U.S. 507; *United States and Bottomley v. Arlington County, Commonwealth of Virginia,* 326 F.2d 929. It is true that the United States need not have a pecuniary interest in order to join in this action as a party plaintiff, but that is not to say that no interest in all will suffice. For, as this Court said at page 518 of the *New Orleans Pac. Ry.* case, supra,: "an interest or concern arising out of an obligation to those for whose benefit the suits are brought" will suffice in lieu of a pecuniary interest. This is the theme which seems to run throughout the cases upon which the Appellees relied below. Such an interest and obligation were the precise reasons that the United States was allowed to bring suit as a party plaintiff in the *Bottomley case,* supra. Bottomley was an officer in the United States Navy, and this gave the United States an interest "involving the national defense." *United States and Bottomley v. Arlington County, Commonwealth of Virginia,* 326 F.2d 929, 932. Similarly, in the *Fitzgerald* case, supra, the United States was attempting to protect an individual in whom they had a legitimate interest. In that case, the defendant, Fitzgerald, had fraudulently obtained certain wool from an Indian on a United States Indian reservation. The Indian was not only a resident of the federal reservation, but his

government allotments and personal property were under the control, supervision and management of the United States. The United States' interest and obligation to protect this individual under this special circumstances is in no way analagous to the instant case. The Red Cross is certainly not a ward of the federal government, nor is its property under the control and supervision thereof. The interest and obligation of the United States to the persons in whose behalf these various suits were brought was simply not present in the instant case. Therefore, those cases are not applicable here. The *Debs case,* supra, is equally distinguishable for the reasons that: 1) this Court found in that case that the government did have a property interest in the subject matter of that controversy (U. S. mail), and 2) the government had specific "powers and duties" relating to the U. S. mail, giving it a right to invoke the courts' aid in the exercise and discharge thereof. *In re Debs,* 158 U.S. 564, 584. In the instant case, the United States had neither a property interest in the suit nor any particular powers or duties relating thereto. The law governing situations where the United States seeks to bring a suit as a party plaintiff was succintly summarized by this court as early as 1887, when it said:

> "[I]f it is apparent that the suit is brought for the benefit of some third party, and that the United States has no pecuniary interest in the remedy sought, and is under no obligation to the party who will be benefited to sustain an action for his use, . . . it can no more sustain such an action than any private person could under similar circumstances. *United States v. San Jacinto Tin Co.,* 125 U.S. 273, 286."

It is submitted that, for the reasons given, the United

States was not a proper party plaintiff to the suit brought in the District Court, and that the District erred in denying Appellants' motion to dismiss.

II.

THE AMERICAN NATIONAL RED CROSS FAILED TO EXHAUST ITS PLAIN, SPEEDY AND EFFICIENT REMEDY IN THE COLORADO STATE DISTRICT COURT AS PROVIDED BY THE COLORADO EMPLOYMENT SECURITY ACT. THE FEDERAL DISTRICT COURT SHOULD NOT HAVE EXERCISED ITS JURISDICTION WITHOUT REQUIRING SUCH EXHAUSTION.

28 *U.S.C., Section* 1341, 62 *Stat.* 932 *provides:*

> "The district courts shall not enjoin, suspend or restrain the assessment, levy, or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

Thus, it has been repeatedly held that federal courts will not restrain state officers from collecting state taxes if the state laws afford the taxpayer an adequate remedy by which to pursue his grievance. *Matthew v. Rogers,* 284 U.S. 521; *Toomer v. Witsell,* 334 U.S. 385. A plaintiff is simply not entitled to relief by injunction in federal court against a state statute where he fails to show that his federal rights could not be preserved by proper proceedings in a state court. *Wreiole v. Waterfront Commission of New York Harbor,* D.C.N.Y. 1955, 132 F.Supp. 166; *Guerra v. City of Philadelphia,* D.C. Pa. 1940, 30 F.Supp. 791.

It is clear that the facts of the instant case bring it squarely within the scope of *Section* 1341 and the case law relating thereto, provided the state remedy available under the *Colorado Employment Security Act, Colorado Revised Statutes, Section* 82-9-9 was "plain, speedy and efficient." It has been said that the question as to what constitutes a plain, speedy and efficient remedy is not dependent upon any general rule, but upon the facts of each particular case. *State v. Police Court of Seattle,* 128 P.2d 332, 336, 14 Wash.2d 340. Certainly it can at least be said that such a remedy is one "as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity." *Boyce's Executors v. Brundy,* 28 U.S. 210, 215; *Payne v. Hook,* 74 U.S. 425, 430.

The Colorado Employment Security Act, Colorado Revised Statutes, Section 82-9-9 provides, in pertinent part, as follows:

> "REFUNDS.—(1) An employing unit may file a written application for refund of money paid erroneously, and if the department shall determine that such payment, or any portion thereof, was paid erroneously, the department shall either issue to the employing unit a credit memo therefor, or make a refund thereof, in either event without interest thereon. . . . If such application for refund is refused, or if no final action is taken thereon within six months, an employing unit may commence an action in the district court for the city and county of Denver for the collection thereof."

The Red Cross contended in the trial below that this statute did not provide a "plain, speedy and efficient"

remedy because of the inability of an employing unit to receive interest on any money refunded as a result of erroneous payment. This contention is unsound. In the case of *Bucklin Coal Mining Co. v. Unemployment Compensation Commission,* D.C. Mo., 53 F.Supp. 484, 487, the Missouri Unemployment Compensation Law. which provided for refund of erroneous payments "without interest", was held to provide an adequate state remedy, thereby preventing the Federal District Court from exercising its jurisdiction to enjoin collection of future taxes. And in *Corbett v. Printers and Publishers Corp.,* C.C.A. Cal., 127 F.2d 195, 197, the California Retail Sales Act was held to provide a "plain, speedy and efficient remedy even though no interest was allowed on tax refunds for a period of up to thirty days preceding the date of the refund warrant. A similar provision in the California Use Tax Act, prohibiting payment of interest on tax refunds for a period of up to thirty days, was likewise upheld as affording an "adequate remedy at law." *Nevada-California Electric Corp. v. Corbett,* D.C. Cal., 22 F.Supp. 951, 954. Nor has the Red Cross been able to cite any cases specifically making the payment of interest a pre-requisite to a finding that a "plain, speedy and efficient" remedy exists at law. It is submitted that a mere denial of interest does not make the state remedy inadequate. The Red Cross would have been able to obtain a remedy in the Colorado State District Court which was as practical and efficient to the ends of justice as its remedy in the Federal District Court.

The remedy provided under the Colorado Employment Security Act being plain, speedy and efficient, the Red Cross should have therefore brought this action in the Colorado State District Court. The Federal District Court

erred in exercising its jurisdiction over the action without first requiring such exhaustion of the state remedy. The District Court's lack of jurisdiction was made even more serious by the fact that the State of Colorado, while having waived its sovereign immunity to allow suit under the *Colorado Employment Security Act, Colorado Revised Statutes, Section* 82-9-9 in the state courts, did not waive such immunity with regard to suit in a federal court. A waiver of the former is by no means a waiver of the latter. *Chandler v. Dix,* 194 U.S. 590; *Petty v. Tennessee-Missouri Bridge Commission,* 359 U.S. 275. Thus, the Federal District Court violated Colorado's sovereign immunity as provided under the 11th Amendment to the United States Constitution, when it exercised its jurisdiction over this case. *State of Missouri v. Fiske,* 290 U.S. 18.

III.

ASSUMING THE AMERICAN NATIONAL RED CROSS IS AN INSTRUMENTALITY OF THE UNITED STATES, CONGRESS HAS WAIVED ANY TAX IMMUNITY TO WHICH IT WOULD OTHERWISE BE ENTITLED IN THE INSTANT CASE. THE STATUTES WAIVING THE IMMUNITY BEING UNAMBIGUOUS ON THEIR FACE, RESORT CANNOT BE HAD TO LEGISLATIVE HISTORY IN THE FORM OF CONGRESSIONAL DEBATES.

Assuming arguendo that this Court should find that the Appellee, Red Cross, is an instrumentality of the United States, it is submitted that the Congress of the United States has nevertheless waived any and all im-

munity from state unemployment taxes to which it would otherwise be entitled. In this regard, 26 U.S.C., Section 3305(b) provides:

> "(b) Federal instrumentalities in general.—The legislature of any State may require any instrumentality of the United States (except such as are (1) wholly owned by the United States; or (2) exempt from the tax imposed by section 3301 by virtue of any other provision of law), and the individuals in its employ, to make contributions to an unemployment fund under a State unemployment compensation law. * * *"

Acting pursuant to the above statute, the State of Colorado made specific provision in the Colorado Unemployment Security Act for that Act to apply in instrumentalities of the United States. *Colorado Revised Statutes, Section* 82-1-3(8)(e).

Since 26 *U.S.C., Section* 3305(*b*) excludes from the waiver of immunity only those instrumentalities to which 26 *U.S.C., Section* 3306(*c*)(6) applies, the provisions of the latter section should be noted. That section specifically applies to two kinds of instrumentalities; those which are:

(A) Wholly or partially owned by the United States, or

(B) Exempt from the tax imposed by Section 3301 by virtue of any provisions of law which specifically refers to such section (or the corresponding section of prior law) in granting such exceptions.)

The Red Cross does not contend that it is either wholly

or partially owned by the United States, so the question of the applicability of Section 3306(c)(6) to the Red Cross turns on whether or not the Red Cross is within the scope of sub-paragraph (B) thereof. Namely, is it excluded from the tax imposed by Section 3301 and does the exempting statute specifically refer to Section 3301?

The Appellees contend that Section 3306(c)(8) makes specific reference to Section 3301 and that the Red Cross is thereby within the scope of Section 3306(c)(6) and immune from the tax imposed by the Appellant, Department of Employment. Reliance is placed upon the fact that when Section 3306(c)(8) is read together with opening sentence of Section 3306(c), the resultant passage provides:

> (c) For the purposes of this chapter, the term "employment" means . . . any service . . . except . . .
>
> (8) service performed in the employ of a religious, charitable, educational or other organization described in section 501(c)(3). . . .

The question is simply this: Does the above quoted passage "specifically refer" to Section 3301. The Red Cross argues that the phrase, "For the purposes of this chapter," makes specific reference to every section in that chapter, including Section 3301. This interpretation flies in the face of the plain meaning of Section 3306(c)(6)(B), which imposes the "specific reference" requirement.

It cannot be logically argued that the requirement of "specific reference" to Section 3301 is met by a section which makes no mention whatsoever of Section 3301. Yet, this is the very thrust of Appellee's argument. The phrase, "For the purposes of this chapter" is at the very

most a general reference to the contents of that chapter; it is by no stretch of the imagination a *specific* reference to a particular section. The statute is unambiguous on its face, and it demands this construction. General reference will not suffice where specific reference is required.

The Red Cross attempts to bolster its position by reference to statements made by members of the House of Representatives when this legislation was in committee. It is submitted that no such reference is necessary for purposes of construing Section 3306(c)(6),(8). These provisions are clear and unambiguous on their face, and should be construed accordingly:

> "The meaning, intent and purpose of an unambiguous act must be obtained from the act itself and not from the expressions of legislators *or their committees.* Marche v. United States, (5CCA) 126 F.2d 671. United States v. Ogilvie Hardware Company, (5CCA) 126 F.2d 577. It is never permissible to allow the discussions and views of legislators, friendly or unfriendly to such legislation, to disparge the validity of the ultimate work of the legislative body. Any such impeachment in such manner of an unambiguous enactment would violate every principal of estoppel. The speeches of a legislator and the *discussions of an enactment in committee,* or even explanations of a witness before the committee as to the meaning, or intention or purpose of a statute is universally considered a very poor and impoverished source on which to rely to glean the legislative intent." *United States v. State of Mississippi,* 229 F.Supp. 925, 971; (Emphasis added.)

For, as this Court ruled in the case of *Aldridge v. Williams*, 44 U.S. 9, 24, the judgment of a court cannot be influenced by the construction placed upon a particular statute by members of Congress during the debate which took place on its passage, nor by their stated reasons for supporting or opposing the statute. That this doctrine applies equally to committee debates on the floor of either House is also clear. "Not even formal reports—much less the language of a member of a Committee—can be resorted to for the purpose of construing a statute contrary to its plain terms. . . ." *Penn. Railroad Co. v. International Coal Co.*, 230 U.S. 184, 199.

The reasoning underlying the doctrine are partially applicable in the instant case, where only two committee members voiced their opinion:

> [I]t is impossible to determine with certainty what construction was put upon an act by members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed." *United States v. Freight Association*, 166 U.S. 290, 318, 319.

The plain meaning of Section 3306(c)(6), (8), supra, clearly precludes any possibility that the Congress of the United States had any intention of retaining any tax immunities for charitable instrumentalities. The statute, being clear and unambiguous on its face, can have only one

meaning: even if the Red Cross is a governmental instrumentality, its immunity has been waived, and it is subject to the state tax levied by the Appellants.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

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APPENDIX A

1. Title 10 U.S.C., Section 2602(a),(e), 67 Stat. 178, 179 is set forth as follows:

> (a) Whenever the President finds it necessary, he may accept the cooperation and assistance of the American National Red Cross, and employ it under the armed forces under regulations to be prescribed by the Secretary of Defense.
> (e) For the purposes of this section, employees of the American National Red Cross may not be considered as employees of the United States.

2. Title 12 U.S.C., Section 30, 24 Stat. 18 is set forth as follows:

> Any national banking association may change its name or the place where its operations of discount and deposit are to be carried on . . . with the approval of the Comptroller of the Currency, . . . but no change of name or location shall be valid until the comptroller shall have issued his certificate of approval of the same.

3. Title 12 U.S.C., Section 51(a), 48 Stat. 147 is set forth as follows:

> (a) [A]ny national banking association may, with the approval of the Comptroller of the Currency . . . issue preferred stock of one or more classes in such amount and with such par value as shall be approved by said Comptroller.

4. Title 12 U.S.C., Section 55, 19 Stat. 64 is set forth as follows:

If any such association shall fail to pay up its capital stock, and shall refuse to go into liquidation, as provided by law, for three months after receiving notice from the comptroller, a receiver may be appointed to close up the business of the association, according to the provisions of section 192 of this title.

5. Title 12 U.S.C., Section 71(a), 49 Stat. 704, 708 is set forth as follows:

If any national banking association violates the provisions of this section and continues such violation after thirty days' notice from the Comptroller of the Currency, the said Comptroller may appoint a receiver or conservator therefor, in accordance with the provisions of existing law.

6. Title 12 U.S.C., Section 93, 36 Stat. 1167 is set forth as follows:

If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this chapter, all the rights, privileges, and franchises of the association shall be thereby forfeited.

7. Title 12 U.S.C., Section 192, 49 Stat. 721 is set forth as follows:

On becoming satisfied, as specified in sections 131 and 132 of this title, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver. . . .

8. Title 12 U.S.C., Section 215(a), 73 Stat. 460 is set forth as follows:

> (a) Any national banking association or any bank incorporated under the laws of any State may, with the approval of the Comptroller, be consolidated with one or more national banking associations located in the same State . . .

9. Title 26 U.S.C., Section 3301, 68 Stat. 439 is set forth as follows:

> There is hereby imposed on every employer (as defined in section 3306(a)) for the calendar year 1955 and for each calendar year thereafter an excise tax, with respect to having individuals in his employ, equal to 3 per cent of the total wages (as defined in section 3306(b)) paid by him during the calendar year with respect to employment (as defined in section 3306(c)) after December 31, 1938.

10. Title 26, U.S.C. Section 3305(b), 74 Stat. 983 is set forth as follows:

> (b) Federal Instrumentalities in General.—The legislature of any State may require any instrumentality of the United States (other than an instrumentality to which section 3306(c)(6) applies), and the individuals in its employ, to make contributions to an unemployment fund under a State unemployment compensation law approved by the Secretary of Labor under section 3304 and (except as provided in section 5240 of the Revised Statutes, as amended (12 U.S.C., sec 484), and as modified by sub-section (c)), to

comply otherwise with such law. The permission granted in this subsection shall apply (A) only to the extent that no discrimination is made against such instrumentality, so that if the rate of contribution is uniform upon all other persons subject to such law on account of having individuals in their employ, and upon all employees of such persons, respectively, the contributions required of such instrumentality or the individuals in its employ shall not be at a greater rate than is required of such other persons and such employees, and if the rates are determined separately for different persons or classes of persons having individuals in their employ or for different classes of employees, the determination shall be based solely upon unemployment experience and other factors bearing a direct relation to unemployment risk; (B) only if such State law makes provisions for the refund of any contributions required under such law from an instrumentality of the United States or its employees for any year in the event such State is not certified by the Secretary of Labor under section 3304 with respect to such year; and (C) only if such State law makes provision for the payment of unemployment compensation to any employee of any such instrumentality of the United States in the same amount, on the same terms, and subject to the same conditions as unemployment compensation is payable to employees of other employers under the State unemployment compensation law.

11. Title 26 U.S.C., Section 3306(c)(6),(8), 74 Stat. 983, 984, 986 is set forth as follows:

(c) Employment.—For purposes of this chapter, the

term "employment" means any service performed prior to 1955 which was employment for purposes of subchapter C of chapter 9 of the Internal Revenue Code of 1939 under the law applicable to the period in which such service was performed, and any service, of whatever nature, performed after 1954 by an employee for the person employing him, irrespective of the citizenship or residence of either. (A) within the United States, or (B) on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while an employee is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aircraft when outside the United States, except—. . .

(6) service performed in the employ of the United States Government or of an instrumentality of the United States which is

(A) wholly or partially owned by the United States, or

(B) exempt from the tax imposed by section 3301 by virtue of any provision of law which specifically refers to such section (or the corresponding section of prior law) in granting such exemption; . . .

(8) service performed in the employ of a religious, charitable, educational or other organization described in section 501(c)(3) which is exempt from income tax under section 501(a); . . .

12. Title 28 U.S.C., Section 1253, 62 Stat. 928 is set forth as follows:

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

13. Title 28 U.S.C., Section 1331(a), 72 Stat. 415 is set forth as follows:

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

14. Title 28 U.S.C., Section 1341, 62 Stat. 932 is set forth as follows:

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

15. Title 28 U.S.C., Section 1345, 62 Stat. 933 is set forth as follows:

Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

16. Title 28 U.S.C., Section 2281, 62 Stat. 968 is set forth as follows:

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

17. Title 36 U.S.C., Section 2, 61 Stat. 81 is set forth as follows:

The name of this corporation shall be "The American National Red Cross", and by that name it shall have perpetual succession, with the power to sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States; to have and to hold such real and personal estate as shall be deemed advisable and to dispose of the same, to accept gifts, devises, and bequests of real and personal estate for the purposes of this corporation hereinafter set forth; to adopt a seal and the same to alter and destroy at pleasure; and to have the right to have and to use, in carrying out its purposes hereinafter designated as an emblem and badge, a Greek red cross on a white ground, as the same has been described in the treaties of Geneva, August twenty-second, eighteen hundred and sixty-four, and July twenty-seventh,

nineteen hundred and twenty-nine, and adopted by the several nations acceding thereto; to ordain and establish bylaws and regulations not inconsistent with the laws of the United States of America or any State thereof, and generally to do all such acts and things as may be necessary to carry into effect the provisions of sections 1, 2, 3, 4a,—6, 8 and 9 of this title and promote the purposes of said organization; and the corporation created is designated as the organization which is authorized to act in matters of relief under said treaties. In accordance with the said treaties, the delivery of the brassard allowed for individuals neutralized in time of war shall be left to military authority.

18. Title 36 U.S.C., Section 3, 67 Stat. 178 is set forth as follows:

The purposes of the corporation are and shall be—
First. To furnish volunteer aid to the sick and wounded of Armed Forces in time for war, . . .
Fourth. To act in matters of voluntary relief and in accord with the military authorities as a medium of communication between the people of the United States of America and their Armed Forces, . . .

19. Title 36 U.S.C., Section 5(a)-(c), 61 Stat. 82 is set forth as follows:

(a) Eight Governors shall be appointed by the President of the United States. Of the Governors so appointed, one shall be designated by the President of the United States to act as the principal officer of the corporation with such title and such functions as may from time to time be prescribed in the bylaws; . . .

(b) Thirty Governors shall be elected by the chapters. . . .

(c) Twelve Governors shall be elected by the Board of Governors as members-at-large. . . .

20. Title 36 U.S.C., Section 7, 67 Stat. 179 is set forth as follows:

The American National Red Cross annually shall reimburse the Department of Defense for auditing its accounts, and the sum so paid shall be covered into the Treasury of the United States as a miscellaneous receipt.

21. Title 42 U.S.C., Section 1855a., 64 Stat. 1109 is set forth as follows:

As used in this chapter, the following terms shall be construed as follows unless a contrary intent appears from the context: . . .

(f) "Federal agency" means any department, independent establishment, Government corporation, or other agency of the executive branch of the Federal Government, excepting, however, the American National Red Cross.

22. Colorado Revised Statutes, Section 82-1-3(8)(e) is set forth as follows:

Definitions.—As used in this chapter, unless the context clearly requires otherwise: . . .

(8) The term "employment" shall not include: . . .

(e) Service performed in the employ of the United States government, or a national bank or state bank

which is a member of the federal reserve system, or a federal savings and loan association or a state building and loan association which is a member of the federal home loan bank system, which institutions were, prior hereto, exempt from this chapter, or any other instrumentality of the United States exempt under the constitution of the United States from the contributions imposed by this chapter, except that to the extent that the Congress of the United States shall permit states to require any instrumentalities of the United States to make payments into an unemployment fund under a state unemployment compensation law, all of the provisions of this chapter shall be applicable to such instrumentalities, and to services performed for such instrumentalities, in the same manner, to the same extent and on the same terms as to all other employers, employing units, individuals and services; provided that if this state shall not be certified for any year by the federal security agency under section 1603(c) of the federal internal revenue code, the payments required of such instrumentalities with respect to such year shall be refunded by the department from the fund in the same manner and within the same period as is provided in section 82-9-9 with respect to contributions erroneously collected.

23. Colorado Revised Statutes, Section 82-9-9 is set forth as follows:

Refunds.—(1) An employing unit may file a written application for refund of money paid erroneously, and if the department shall determine that such payment, or any portion thereof, was paid erroneously, the department shall either issue to the employing unit a

credit memo therefor, or make a refund thereof, in either event without interest thereon. In no event may an employing unit recover money paid erroneously, or otherwise, which has been paid prior to the first day of January of the first year of the two calendar years immediately preceding the date of filing of the application for refund. If such application for refund is refused, or if no final action is taken thereon within six months, an employing unit may commence an action in the district court for the city and county of Denver for the collection thereof. In the event of court action no recovery of any money paid prior to the first day of January of the first year of the two calendar years immediately preceding the date of the filing of the application shall be allowed. For like cause and for the same period a recovery as above indicated may be allowed on the department's own initiative.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 78

DEPARTMENT OF EMPLOYMENT AND BERNARD E. TEETS, EXECUTIVE DIRECTOR OF EMPLOYMENT OF THE DEPARTMENT OF EMPLOYMENT, APPELLANTS

v.

THE UNITED STATES OF AMERICA, AND THE AMERICAN NATIONAL RED CROSS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

BRIEF FOR THE APPELLEES

OPINION BELOW

The findings of fact, conclusions of law and supplemental conclusions of law of the United States District Court for the District of Colorado (R. 20–29) have not been reported.

JURISDICTION

The judgment of the three-judge district court was filed on September 16, 1965 (R. 28). The notice of appeal was filed on November 15, 1965 (R. 30).

On May 23, 1966, this Court postponed further consideration of its jurisdiction until the hearing on the merits (R. 121; 384 U.S. 949). Appellants invoke the jurisdiction of this Court under 28 U.S.C. 1253.

QUESTIONS PRESENTED

1. Whether The American National Red Cross is constitutionally immune, as an instrumentality of the United States, from the Colorado unemployment tax (4 Colo. Rev. Stat. Ann., § 82–6–1).

2. Whether Congress has waived the Red Cross' constitutional immunity from State unemployment taxes.

3. Whether 28 U.S.C. 1341 prevented the district court from entertaining the instant suit on the ground that there was a plain, speedy, and efficient remedy available in the Colorado courts.

4. Whether this suit is barred by the Eleventh Amendment to the Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant provisions of the Constitution of the United States, the Colorado Employment Security Act, and the federal statutes are set forth in the Appendix, *infra*, pp. 55–75.

STATEMENT

This is a direct appeal from the final judgment after trial of a three-judge district court (R. 20–29) enjoining, on constitutional grounds, the collection of Colorado unemployment taxes from The American National Red Cross (Red Cross) and directing a refund of taxes previously collected. The Colorado

Employment Security Act requires employers, including charitable organizations, to pay a tax measured by wages paid to employees. 4 Colo. Rev. Stat. Ann., § 82–6–1. The district court concluded (1) that the Red Cross "is an instrumentality of the United States, and as such is immune from taxation under the Colorado Employment Security Act," and (2) that "the 1960 amendments to the Federal Unemployment Tax Act do not waive the immunity of the Red Cross from taxation" (R. 24–25).

1. THE RED CROSS AND ITS OPERATIONS

The Red Cross, whose genesis goes back to the society founded in 1881 under the leadership of Clara Barton, now exists and operates as a corporation under a federal charter granted by Act of Congress in 1905 (App., *infra*, pp. 55–61).[1] The purposes of this Act, as appears from its preamble as well as its body, were to reincorporate the then existing society, place it under government supervision, and establish the Red Cross as the official organization through which the government would discharge its obligations under the Red Cross Treaty of 1864.[2] The charter was

[1] Act of January 5, 1905, c. 23, 33 Stat. 599 (36 U.S.C. 1–6, 8, 9), hereinafter referred to as Act of 1905.

[2] Geneva Convention of August 22, 1864, for the Amelioration of the Condition of the Wounded in Armies in the Field, 22 Stat. 940 (1882), Treaty Series No. 377. This treaty, *inter alia*, embodied the first international agreement to provide, through both military and civilian effort, care of wounded and sick combatants, irrespective of their nationality, and for conferring neutral and protected status on ambulances, hospitals, and personnel engaged in aiding and caring for the wounded and sick under the Red Cross emblem.

later amended by Congress to designate the Red Cross as the organization that would also discharge the obligations of the United States under "any other treaty or convention similar in purpose to which the United States of America may hereafter give its adhesion" (App., *infra*, p. 62).[3] In addition to the Red Cross Treaty of 1864, these agreements now include the Red Cross Treaty of 1929[4] and the 1949 Geneva Convention for the Multilateral Protection of War Victims.[5]

The Act of 1905 granting the Red Cross a new federal charter also provided for its cooperation with the United States military forces by aiding sick and wounded troops and acting as a medium of communication between the people of the United States and their armed forces (App., *infra*, p. 58). Congress has specifically authorized the President to "employ [the Red Cross] under the armed forces under regulations to be prescribed by the Secretary of Defense."[6] Thereafter the Red Cross made a written tender of services and assistance, the government accepted, and extensive regulations covering Red Cross activities

[3] Act of May 8, 1947, c. 50, 61 Stat. 80, § 4.

[4] Geneva Convention of July 27, 1929, for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field, 47 Stat. 2074 (1932), Treaty Series No. 847. This Treaty revised and extended the Red Cross Treaty of 1864 and more specifically recognized the official and protected status of the Red Cross societies duly authorized by their governments to assist in carrying out the latters treaty obligations.

[5] 6 U.S. Treaties 3114; Ex. 1. Pursuant to stipulation between the parties the exhibits have not been printed but both parties may cite and refer to the unprinted portions of the record.

[6] 10 U.S.C. 2602.

were promulgated.[7] The Red Cross has rendered and continues to render substantial services to the military establishment. For example, the armed services rely upon it to make certain investigations for the benefit of servicemen and their dependents. When a serviceman requests compassionate leave, transfer, or discharge—generally because of a personal problem at home—the Red Cross investigates the grounds stated therefor and forwards a report to the commanding officer concerned. Shortly before the time of trial, a daily average of 2,400 communications relating to such requests were being handled by Red Cross. Similarly, when a question arises as to proper diagnosis or treatment of a soldier's mental or physical ailment and the army desires an investigation of the patient's past medical history, the Red Cross conducts it. Again, after an individual has been convicted of a criminal offense by a court martial, the Red Cross makes a report which serves essentially the same purpose as a probation report in a federal criminal court. The Red Cross is the only organization performing these services for the military. R. 64–67, 72–76.

In order to help the Red Cross carry out its aid to the armed services, Congress has authorized the military to make available, without charge, a variety of services, equipment and facilities, including (1) free transportation for both the Red Cross' personnel and its supplies, (2) meals and quarters for Red Cross personnel, without charge if so furnished to civilian employees of the United States, (3) free office space,

[7] R. 46–49, 61–62; Exs. 2, 3, 4, 5, 6, 7.

storage facilities and wharfage for Red Cross personnel and supplies, (4) free use of the military's communications system, (5) assignment of medical officers from the armed services to the Red Cross, and (6) free use of Defense Department equipment for training Red Cross personnel. 10 U.S.C. 2542, 2602, 2670, 3539, 5987 (App. *infra*, pp. 70–72). See also *id.* 4624, 4625, 9624, 9625.

In addition to services to the military, the Act of 1905 provides for the Red Cross "to continue and carry on a system of national and international relief in time of peace and apply the same in mitigating the sufferings caused by pestilence, famine, fire, floods, and other great national calamities, and to devise and carry on measures for preventing the same" (App., *infra*, p. 50). Congress has more recently recognized the Red Cross' extensive role in carrying out disaster relief in the United States. The Federal Disaster Act of 1950[8] (App., *infra*, pp. 67–70) gives the President power to use federal funds, manpower and supplies in cases of major domestic disasters. Under the Act the federal government has primary responsibility for aiding the public sector of a devastated community—*i.e.*, restoring municipal services such as roads and utilities—while primary responsibility for aiding the private sector of the community is reserved to the Red Cross. The Act directs federal agencies to "cooperate to the fullest extent possible with * * * the American National Red Cross," authorizes the

[8] Act of September 30, 1950, c. 1125, 64 Stat. 1109, §§ 1–8 (42 U.S.C. 1855–1855g).

President to give the Red Cross "medicine, food and other consumable supplies" for distribution to the public, and provides that "nothing contained in this Act shall be construed to limit or in any way affect the responsibilities of the American National Red Cross under the Act approved January 5, 1905 * * *" (App., *infra*, pp. 68–69).

The federal government and the Red Cross have entered into a memorandum of understanding defining their respective areas of operation and responsibility under the 1950 Act (R. 79–81; Ex. 8). The memorandum provides, in part, that "The Red Cross will continue to carry out its traditional services to those in need as a result of disasters and "agree[s] to" continue using contributions from the general public "to discharge its responsibilities in disasters" (Ex. 8). As the former Director of the Office of Emergency Planning testified, the disaster activities of the federal executive agencies "as well as the activities of the American National Red Cross are coordinated on behalf of the President by the Director of the Office of Emergeney Planning" (R. 78–79).

The Red Cross has also been used by the federal government for a variety of other important tasks. For example, during the depression, Congress designated the Red Cross as its agency to distribute government-owned wheat and cotton, or food and fabric produced therefrom, to the needy.[9] During and fol-

[9] Joint Resolution of March 7, 1932, c. 72, 47 Stat. 61; Joint Resolution of July 5, 1932, c. 431, 47 Stat. 605; Joint Resolution of February 11, 1933, c. 49, 47 Stat. 799. For a detailed report of these operations see Ex. 21.

lowing World War II the Red Cross was the agency which, pursuant to designation by Congress [10] and President Roosevelt,[11] distributed relief supplies purchased with government funds.[12]

While the Red Cross is primarily dependent on voluntary private contributions of funds and services Congress has granted the Red Cross certain benefits. In addition to services, supplies, equipment and facilities mentioned above (*supra,* pp. 5–6, 6–7), Congress has without charge made government land and buildings available to the Red Cross for its national headquarters,[13] and has supplied the Red Cross with government land on which to build the headquarters of its District of Columbia chapter.[14]

Moreover, the Red Cross has been given a number of benefits under the federal tax laws. Like other charities it is exempt from federal income taxes and contributions to it are tax deductible to a certain extent. 26 U.S.C. 501, 170. However, unlike other charities, it is favored by a special tax provision giving certain types of contributions to the Red Cross more favorable treatment than those to any other or-

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[10] Emergency Relief Appropriation Act, Fiscal Year 1941, c. 432, 54 Stat. 611, Sec. 40; Third Supplemental Appropriation for National Defense Act, Fiscal Year 1942, c. 591, 55 Stat. 810, 817. See pp. 93 and 95 of Ex. 20 for relevant excerpts.

[11] Executive Order 8495, 5 F.R. 2682 (1940); Executive Order 8943, 6 F.R. 5910 (1941).

[12] See Exs. 19 and 20 for detailed reports of these operations.

[13] App., *infra*, pp. 66–67.

[14] 36 U.S.C., note following § 13.

ganization (including contributions to the State governments and to the United States) (26 U.S. C. 114), and the Red Cross is specifically exempted from liability for certain federal excise taxes on transportation and communications which other governmental and charitable organzations must pay.[15]

One of Congress' purposes in passing the Act of 1905, as expressed in the preamble, was to place the Red Cross "under Government supervision."[16] Congress originally authorized the President to appoint two-thirds of the Red Cross' governing body; by a provision in the original act the number of Presidential appointees was later to be reduced to one-third (App., *infra*, pp. 59–60). A subsequent amendment increased the number of directors to 50 and authorized the President to appoint eight, one of whom the President designates as the principal officer of the Red Cross and the other seven of whom are required to be "officials of departments and agencies of the Federal Government" (App., *infra*, p. 64).

In addition, the Red Cross is required to submit to the Secretary of Defense an annual report of its proceedings and a detailed financial report which is audited by the Department of Defense and transmitted to Congress (App., *infra*, p. 61).

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[15] 26 U.S.C. 4253(c), 4263(b).

[16] App., *infra*, p. 56. See also H. Rep. No. 3146, 58th Cong., 3d Sess. p. 1 (1904), expressing the importance of bringing the Red Cross under governmental supervision.

2. THE PRESENT LITIGATION.

Appellant Department of Employment, which is responsible for administering the Colorado unemployment tax, determined that the Red Cross was subject to that tax. The Red Cross paid the tax (amounting to well over $10,000) involuntarily and under protest, accompanying such payment with applications for refund. Appellants denied the refunds and threatened to assess interest and penalties and invoke collection remedies against the Red Cross if it did not continue to pay the tax. (R. 16, 17.)

The Red Cross and the United States then instituted this action for a judgment (1) declaring that application of the Colorado Act to the Red Cross is unconstitutional, (2) directing refund to the Red Cross of taxes collected from it, and (3) permanently enjoining further application of the Act to the Red Cross (R. 1–4). The complaint alleged that the Red Cross is a government instrumentality, that it is constitutionally immune from the Colorado unemployment tax and that, contrary to appellants' contention, Congress has never waived that immunity. The United States was made a plaintiff because of its interest in preserving its and its instrumentality's constitutional immunity from state taxation, and in having the relevant provisions of the Internal Revenue Code of 1954 dealing with the imposition of State unemployment taxes upon federal instrumentalities properly construed and applied (R. 3).

After trial,[11] the district court held that it had jurisdiction over the subject matter and all the parties (R. 24). It also concluded that the Red Cross is a government instrumentality whose constitutional immunity from State unemployment taxation Congress has not waived (R. 25), and that the Red Cross' failure to bring suit in the Colorado courts did not preclude it from obtaining relief (R. 27). Accordingly, it entered judgment directing refund of $27,927.79 to the Red Cross and permanently enjoining appellants from applying the Colorado Act to it (R. 29).

INTRODUCTION AND SUMMARY OF ARGUMENT

The central question presented by the instant case is whether the Red Cross is a federal instrumentality and, as such, immune from Colorado unemployment tax. This question arises because the Colorado Act, unlike most state unemployment statutes, does not exempt charities from its application.

It has been established since at least *McCulloch* v. *Maryland,* 4 Wheat. 316, that the federal Constitution prohibits a State from imposing any tax on the federal government and that a portion of such immunity also extends to certain privately owned corporations created by the United States primarily to perform governmental tasks—such as national banks or the

[11] The district court denied both sides' motions for summary judgment (R. 9). Although it first granted appellants' motion to dismiss the United States as a party plaintiff (R. 9), the district court, upon appellees' motion for rehearing, reserved decision on this motion until trial (R. 15, 38). After trial the court concluded that the United States "is a proper party plaintiff to this action" (R. 25).

original Bank of the United States (which was 80 percent privately owned).[18] That is, the States may not impose any tax upon the operations—as distinguished from the property—of corporations or other entities created by the United States primarily to perform governmental functions which "have been so incorporated into the government structure as to become instrumentalities of the United States" (*United States* v. *Boyd,* 378 U.S. 39, 48) or "so assimilated by the Government as to become one of its constituent parts" (*United States* v. *Township of Muskegon,* 355 U.S. 484, 486) or "integral parts" (*Standard Oil Co.* v. *Johnson,* 316 U.S. 481, 485). Of course, Congress may waive the constitutional immunity of a government instrumentality, just as it may forego the immunity of the United States itself. But in the absence of a clear Congressional waiver, such an instrumentality is protected by the Constitution from the imposition of any State tax on its operations—including a State excise tax on the privilege of employing personnel to carry out its governmental functions.

The purposes, organization and operations of the Red Cross require the conclusion—which has frequently been expressed by Congress, by the Executive Branch, and by the lower courts—that the Red Cross is a "quasi-governmental" or "official" agent of the government. The Red Cross was intended to function and has actually functioned as an "arm of the government,"[19] not only in performing its duties

[18] 3 Stat. 266.

[19] *Standard Oil Co.* v. *Johnson, supra,* at 485.

under the various Geneva treaties, but also in rendering aid and assistance to the armed forces in war and peace and to the American public during national disasters. In performing these functions the Red Cross operates hand in hand with the federal government, under governmental supervision, and with substantial governmental support in the form of services, equipment, supplies and facilities. Its operations, therefore, no less than those of national banks and army post exchanges, are immune from State taxation in the absence of congressional consent.

The 1960 amendments to the federal statutes governing unemployment taxes did not waive the Red Cross' constitutional immunity from State unemployment taxes. This is clear from both the text and the legislative history of the amendments. In an exchange, on the floor of the House, between the Chairman of the committee which reported on the amendments here in question and a member of that committee, Chairman Mills acknowledged that it was "not the intention of the bill to remove the present exemption of Red Cross employment from State unemployment taxation." 106 Cong. Rec. 13,827.

Section 1341 of Title 28 does not bar the instant suit. (1) That provision does not apply where, as here, the United States is a party plaintiff. (2) The remedy provided by the Colorado courts is not "plain, speedy and efficient" within the meaning of 28 U.S.C. 1341, since interest is not recoverable on illegally collected Colorado unemployment taxes. Nor does the

Eleventh Amendment preclude the suit. (1) That amendment does not bar suits by the United States against a State. (2) To the extent that the instant suit sought to restrain a public official (appellant Teets) from unconstitutional conduct, it was not a suit against a State and could have been brought by the Red Cross alone.

ARGUMENT

I

THE RED CROSS IS AN INSTRUMENTALITY OF THE UNITED STATES AND THUS, ABSENT EXPRESS CONGRESSIONAL WAIVER, IS IMMUNE FROM THE IMPOSITION OF A STATE TAX ON ITS OPERATIONS

This Court has long recognized that where a federally created entity is organized and operated as an integral part of the federal government, such entity, by force of the Constitution itself, is immune from State taxation on its operations, despite Congressional silence on the point.[20] This is so even if the body is a wholly or predominantly privately owned profit-

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[20] See, *e.g.*, *McCulloch* v. *Maryland*, *supra*, *Standard Oil Co.* v. *Johnson*, *supra*; *Shaw* v. *Gibson-Zahniser Oil Corp'n.*, 276 U.S. 575, 578–579; and cases cited *infra*, fn. 21. As this Court said in *Callam County* v. *United States*, 263 U.S. 341, 344:

"The immunity is claimed under the Constitution of the United States. It is true that no specific words forbid the tax, but the prohibition established by *McCulloch* v. *Maryland*, 4 Wheat. 316, was established on the ground that the power to tax assumed by the State was in its nature 'repugnant to the constitutional laws of the Union' and therefore was one that under the Constitution the State could not use. 4 Wheat. 425, 426, 430. The immunity is derived from the Constitution in the same sense and upon the same principle that it would be if expressed in so many words. * * *"

making entity."[21] Of course, whether the entity is private or public, whether it is designed to make a profit, and whether it performs extensive nongovernmental activities are all important in determining whether it is actually an instrumentality of the United States.

One of this Court's most recent decisions on the subject involved the status of Army post exchanges. *Standard Oil Co.* v. *Johnson*, 316 U.S. 481. The Court first reviewed the purpose for which these entities had been created and the manner in which they were organized and operated, including the relationship between them and the Department of Defense. The Court also took note of the fact that Congress had frequently recognized that their activities were essentially governmental in nature. The Court then stated (p. 485):

> From all of this, we conclude that post exchanges as now operated are arms of the Government deemed by it essential for the performance of governmental functions. They are integral parts of the War Department, share in fulfilling the duties entrusted to it, and partake of whatever immunities it may have under the Constitution and federal statutes. * * *

We submit that the purposes, organization and operations of the Red Cross, as well as frequent and

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[21] See, *e.g.*, *First National Bank* v. *Anderson*, 269 U.S. 341, 347; *Des Moines Bank* v. *Fairweather*, 263 U.S. 103, 106; *Owensboro National Bank* v. *Owensboro*, 173 U.S. 664, 668; *McCulloch* v. *Maryland*, *supra* (involving the original Bank of the United States which was 80% privately owned—3 Stat. 266); *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 860–862; *California* v. *Pacific R.R. Co.*, 127 U.S. 1, 38–42; *Thomson* v. *Pacific R.R. Co.*, 9 Wall. 579, 589.

long-standing congressional, executive, and judicial pronouncements, demonstrate that the Red Cross, like army post exchanges and national banks, is an "arm of the Government." It was organized to and does perform functions which are indispensible to the proper operation of the government. Most of its activities are performed in close coordination with the federal government, which retains significant supervisory powers over the Red Cross. The remainder of its activities constitute preparation for and close support of its duties on behalf of the federal government. It has no private shareholders and no private, profit-making aspects. The entire purpose of the Red Cross is to act as an arm of the federal government by performing governmental functions in close cooperation with the federal government.

A. THE RED CROSS ACTS IN CLOSE COORDINATION WITH THE UNITED STATES IN PERFORMING IMPORTANT GOVERNMENTAL DUTIES

The Red Cross acts as the exclusive representative of the United States in discharging at least three categories of the federal government's duties.

First, Congress has designated the Red Cross as the organization which performs the United States' duties under a series of treaties which have been [redacted] by the President with the consent of the Senate and to which the United States is now an official party.[22] These are the Geneva Convention of 1864, the Red Cross Treaty of 1929 and the Geneva Conference of 1949. Moreover, the Congress has designated the Red Cross "to perform all the duties devolved upon a national society" by any future "treaty or convention similar in purpose to which the United States of

[22] App. *infra*, pp. 55–56, 57–58, 62; see also *supra*, pp. 3–4.

America may hereafter give its adhesion."[23] See R. 39–40, 42, 44; Ex. 1.

To the extent that these activities may include the rendering or supervising of war-time medical care to captured enemy wounded, Congress has authorized the Department of Defense to furnish the Red Cross with a variety of facilities and possibly even with personnel. See 10 U.S.C. 2602, 2670, 3539, 5987, 4624, 4625, 9624, 9625. And, of course, by practical necessity—since the subjects of these services would normally be not only belligerents but also prisoners of the United States Armed Forces—the Red Cross must perform these duties in close coordination with and under the supervision of the United States military authorities.[24] In addition, the American Red Cross may, through or on behalf of the International Committee of the Red Cross, perform treaty duties in relation to captured servicemen—such as inspecting the facilities and treatment given to such prisoners, facilitating communications between them and their families, and transmitting food, medical supplies and clothing to them. These might involve international contacts with various nations and would, of course, be of great concern to our government. Moreover, the Red Cross is responsible for assembling and transporting packages such as food, clothing and medical supplies to captured American troops, and in this endeavor it obtains clothing and other supplies and support as well as transportation services from the

[23] App., *infra*, p. 62.

[24] See Geneva Convention of 1949, Article 26; Ex. 1, p. 20, which provides that in performing such duties Red Cross personnel "are subject to military laws and regulations."

Defense Department."[25] It is thus evident that for the Red Cross successfully to carry out its numerous duties under the treaties signed by the United States, there must be extensive cooperation between the Red Cross and the United States government, and that in carrying out these duties in military theatres of war the Red Cross must operate under the supervision of the armed forces.

Second, pursuant to statutes, regulations, and a written agreement with the military, the Red Cross performs a variety of services which are practically indispensable to the proper daily operation of our armed forces.[26] In both peacetime and wartime the Red Cross maintains an extensive, worldwide system for conducting investigations into servicemen's personal and medical problems at the request of the military authorities. These include investigations and reports needed by the military in making decisions on medical care and treatment (R. 64–65, 75–76), applications for compassionate leave, transfer or discharge (R. 65) and sentencing after conviction by court martial (R. 66). Such services are indispensable to the proper and efficient operation of the military and are rendered neither by any other arm of the military establishment nor by any other non-military organization (R. 64–67). In order for the military to perform these services itself, it would need large additional appropriations from Congress in order to develop a

[25] See generally Exs. 1, 5, 6, 7, 13–18; R. 63, 95; 10 U.S.C. 2602.

[26] See, *e.g.*, 10 U.S.C. 2602; 36 U.S.C. 3; Exs. 2, 3, 4, 5, 6, 7; R. 46–49, 61–62.

nationwide network of volunteers or paid investigators, and, in the opinion of the Senior Advisor to the Assistant Secretary of Defense for Manpower, the military might even then be unable to do the job as well as the Red Cross (R. 66–67, 72–74).

In addition, Red Cross personnel work hand in hand with the military medical authorities in armed forces hospitals. Although some of these services—such as social, counseling and entertainment functions—may be rendered by other organizations as well as the Red Cross (R. 74–75), many of the Red Cross services—especially in time of war are far more extensive than those of other organizations and require the closest degree of cooperation between Red Cross and armed forces medical personnel (R. 64, 70–71, 92–93, 95).

In recognition of the integral relationship between the Red Cross and the Department of Defense and the essentially governmental functions performed by the Red Cross in the military sector, Congress has authorized the President to "employ it [the Red Cross] under the armed forces under regulations to be prescribed by the Secretary of Defense" (10 U.S.C. 2602(a))and has authorized the military to furnish the Red Cross with extensive services, equipment, facilities and personnel."[11] The Red Cross and the President have entered into a formal offer and acceptance of assistance and cooperation, and the armed services have published extensive regulations dealing with the

[11] See discussion, *supra*, pp. 5–6.

allocation of duties between the Red Cross and the military."[28]

Third, the Red Cross performs extensive governmental services in close coordination with the federal government in handling disaster relief. The federal government has undertaken the responsibility of aiding the States in cases of major disasters, such as floods, earthquakes, hurricanes and the like. Nevertheless, Congress withheld from the executive primary responsibility for aiding the thousands of individual disaster victims because it recognized that the Red Cross was, by Congressional direction, already performing these same tasks.[29] Instead, Congress directed that the executive departments of the government "shall cooperate to the fullest extent possible with * * * the American National Red Cross," including providing it with "medicine, food, and other consumable supplies" for distribution to disaster victims (App., *infra,* pp. 68–69).

Pursuant to this Congressional direction, the Red Cross has entered into a memorandum of understanding with the Office of Emergency Planning, which is charged with administering the Federal Disaster Act (R. 79–81). The memorandum recognizes the Red Cross "as the agency responsible for providing mass care to persons immediately following a dis-

[28] Exs. 2, 3, 4, 5, 6, 7.

[29] The Federal Disaster Act emphasizes this point by explicitly providing that "nothing contained in this Act shall be construed to limit or in any way affect the responsibilities of the American National Red Cross under the Act [of] * * * 1905" (App., *infra,* p. 69).

aster," and establishes methods and means of cooperation between the Red Cross and the federal government in order to accomplish this essential task (Ex. 8). It is now the task of the Director of the Office of Emergency Planning, on behalf of the President, to coordinate the joint disaster activities of the Red Cross and the federal executive agencies (R. 78–79). Moreover, when the executive department receives contributions of money from private citizens designated for individual disaster relief, it generally forwards those contributions to the Red Cross as the agency which is primarily responsible for such functions (R. 82, 85).

Even before the Federal Disaster Act, Congress—recognizing that it had in 1905 delegated to the Red Cross the duty "to carry on a system of national and international relief" [30]—used the Red Cross to distribute government-owned or government-financed food, clothing, and supplies, both at home and abroad.[31]

Pursuant to the provision in the Act of 1905 delegating to the Red Cross the task of "devis[ing] and carry[ing] on measures for preventing" "national calamities," [32] it carries on a number of activities designed to prepare for its duties to the military during war and its duties to the public following a disaster. By carrying on an extensive blood collection program, maintaining blood banks and training people in such skills as nursing, first aid and life saving, the Red

[30] App., *infra*, p. 58.
[31] See *supra*, pp. 7–8.
[32] App., *infra*, p. 58.

Cross is prepared to offer the nation effective help in case of disaster or war." (R. 95, 99.)

In summary, it is clear that Congress created the Red Cross to perform and that the Red Cross has in fact performed a number of important governmental duties in close conjunction with the Department of Defense and other federal executive agencies. The continuous close working relationship between the Red Cross and the United States government is and has been at least as intimate as that between the federal government and the national banks and military post exchanges, both of which have been held to be government instrumentalities. Using the language of this Court, the Red Cross' activities are "so intimately connected with the performance of governmental functions" (*Shaw* v. *Gibson-Zahniser Oil Corp.*, 579) and "so incorporated into the government structure as to [make the Red Cross an] instrumentalit[y] of the United States" (*United States* v. *Boyd, supra,* 378 U.S. at 48). Again using this Court's language, the Red Cross is "an integral part of the [executive] Department[s], share[s] in fulfilling the duties entrusted to [them], and partake[s] of whatever immunities [they] have under the Constitution and federal statutes." *Standard Oil Co.* v. *Johnson, supra,* 316 at 485.

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[28] Even if Congress had not required the Red Cross to engage in these activities, it is clear that a corporation chartered by Congress to perform important governmental functions does not cease to be an instrumentality of the United States merely because it engages in some authorized, but not required, activities. See, *e.g.*, *Osborn* v. *United States Bank, supra,* 9 Wheat. at 860–865.

B. CONGRESS, THE PRESIDENT AND THE JUDICIARY HAVE LONG RECOGNIZED THAT THE RED CROSS IS AN OFFICIAL ORGAN OF THE UNITED STATES

Congress, the President, and the lower courts have often stated that the Red Cross performs important governmental activities as an official agency or instrumentality of the United States or that it has a unique, quasi-governmental status. In a concurrent House-Senate Resolution in 1956 Congress stated that:

> * * * more than fifty years ago the Congress determined that the work of the American National Red Cross was of such importance to the Government and people of the United States * * * that provision should be made for its operation under such grant of authority and such Government supervision as would impart [to it] *official status* * * *.[34]

In addition, the Concurrent Resolution stated that these facts "justified the establishment by the Congress of the American National Red Cross as *the official agent of this Government.*"[35] The Senate Committee Report on this resolution reiterated that "Since 1905 the Red Cross has been incorporated as an *official agency of the United States Government* * * *."[36]

Additionally, when in 1952 Congress, in order to encourage private contributions to the Red Cross, granted a special tax benefit not available to contributors to any other organization, including those to the

[34] H. Cong. Res. 232, 70 Stat. B32 (emphasis added); Ex 30.
[35] *Ibid* (emphasis added).
[36] S. Rep. No. 2139, 84th Cong., 2d Sess., p. 1 (emphasis added). See also S. Rep. No. 460, 83d Cong., 1st Sess., p. 2.

federal and State governments, the House Committee Report stated that:

> The Red Cross has a *unique status* which clearly differentiates it from other charitable organizations. Congress has conferred on the Red Cross a *quasi-governmental status* under legislation which sets forth its principal functions and prescribes its organization and methods of operation. * * * [37]

In the House debates on the 1960 amendments to the federal unemployment compensation statutes (discussed at greater length, *infra*, pp. 43–45), Chairman Mills and Congressman Ikard of the Ways and Means Committee agreed that the Red Cross "has for many purposes been regarded as *an instrumentality of the Federal Government*" and that "the present exemption of Red Cross employment from State unemployment taxation," [38] which arose because it qualified as "an instrumentality of the United States," [39] would continue.

At least eight Presidents have issued proclamations recognizing that the Red Cross is performing essential governmental functions (Exs. 22–29). For example, President Eisenhower has referred to the "Red Cross as this Nation's official volunteer agency." (Ex. 27; 69 Stat. pp. C21–C22). Moreover, in 1918 John W. Davis, who was then Solicitor General and Counselor to the Red Cross, stated that:

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[37] H. Rep. No. 1728, 82d Cong., 2d Sess., p. 2 (emphasis added) Ex. 33.

[38] 106 Cong. Rec., Part 10, p. 13,827; Ex. 70 (emphasis added).

[39] 26 U.S.C., 1958 ed., 3305(b), 3306(c)(6).

> The American Red Cross is a *quasi-governmental organization*, operating under Congressional charter, officered in part, at least, by governmental appointment, disbursing its funds under the security of a government audit, and designated by Presidential order for the fulfillment of certain treaty obligations into which the government has entered.[40]

Similarly, the federal courts have long recognized that the Red Cross is an instrumentality of the United States. As early as 1919 the Court of Appeals for the Eighth Circuit characterized the Red Cross as "an auxiliary to the armed forces." *Granzow* v. *United States*, 261 Fed. 172, 173. In that case the defendant was charged with violating the Espionage Act and the trial judge charged the jury "that an interference with the Red Cross would be an interference with the operation of the military and naval forces" (pp. 172–173). The court of appeals affirmed the conviction, stating that (p. 173):

> While the Red Cross is not itself within the term "military and naval forces," as used in the statute, yet to cripple the Red Cross as operated in this war is to interfere with such forces. * * *

Much more recently, the Court of Claims referred to the Red Cross as an instrumentality of the United States. *Gradall* v. *United States*, 329 F. 2d 960, 964 (dicta).

A large number of State Attorneys General and other similar officials (including an Assistant At-

[40] Ex. 43 (emphasis added).

torney General of Colorado)[41] have over a long period of years ruled that the Red Cross is an instrumentality of the United States and thus exempt from various State taxes on its operations (including unemployment compensation taxes).[42]

In his exhaustive study, *The Legal Status of the Red Cross*, 56 Mich. L. Rev. 1, the late Professor Wesley A. Sturges concluded that (pp. 17, 29, 30):

> The health and welfare services to be rendered by Red Cross to the armed forces in time of war are unique functions; they are not duplicated by the military establishment; they are not shared by any other government corporation. They put the Red Cross in the position of an auxiliary of the military establishment. * * *
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> * * * * * *
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> * * * Red Cross, in the performance of [its] charter powers and duties, will be adjudged to be a specialized, integral unit of the Government of the United States committed to the performance of functions of the government and to be reckoned with accordingly.
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> * * * * * *
>
> * * * [T]he courts, in the few cases in which Red Cross has been involved, congressional committees, federal tax authorities, and state tax and state regulatory authorities (with a

[41] Attachment 2 to affidavit in support of appellees' motion for summary judgment—unprinted record, p. 14. See stipulation, *supra*, fn. 5, p. 4.

[42] Most of these rulings are considered by Prof. Sturges in his article, discussed *infra*. See also Exs. 45–49, 62, 63, 66, 69 marked for identification but not received in evidence. For similar rulings by the Internal Revenue Service see Exs. 34–39.

> single exception)[43] have been in accord in identifying the corporation as an integral unit of the Government of the United States and engaged in performing functions thereof. * * *

C. THE GROUNDS UPON WHICH APPELLANTS URGE THAT THE RED CROSS IS NOT A FEDERAL INSTRUMENTALITY ARE WITHOUT MERIT

In the face of this strong showing of the Red Cross' close relationship with the federal government and the important governmental functions it performs, the grounds upon which appellants challenge the district court's holding are unpersuasive.

1. Appellants argue that the Red Cross cannot be a government instrumentality because it is not required to perform any government functions, but is merely authorized to do so. The objective evidence does not support this contention. The context and language of the 1905 Act creating the present Red Cross corporation make it abundantly clear that Congress was delegating to the Red Cross "all the duties which have heretofore been performed" by the predecessor Red Cross corporation, including the requirement that it "perform all the duties devolved upon a national society" by the various Red Cross treaties (App., *infra*, p. 58). Moreover, the Federal Disaster Act of 1950 specifically provides that "nothing con-

[43] The sole exception to which Dean Sturges refers is an opinion of the Attorney General of New Mexico which was explicitly overruled a short time thereafter. Opinion of the Attorney General of New Mexico, No. 57-239, dated September 24, 1957, Ex. 53, marked for identification but not received in evidence.

tained in this Act shall be construed to limit or in any way affect the responsibilities of the American National Red Cross under the Act [of] * * * 1905" (App., *infra*, p. 69). A Report of the House Ways and Means Committee two years later states that "Specific duties, such as the furnishing of aid to the sick and wounded of armies in time of war, are imposed upon the Red Cross by statute." H. Rep. No. 1728, 82d Cong., 2d Sess., p. 2. In its 1956 Concurrent Resolution Congress again recognized that it had imposed "duties" upon the Red Cross as an "official agent of this Government". H. Cong. Res. 232, *supra*. Expressions by the Executive Department have been equally clear. In 1911 President Taft directed (37 Stat. 1717):

> That should it be desirable in time of war, or when war is imminent, * * * the Secretary of [War or Navy] is authorized to communicate with the President of the [Red Cross], specifying the character of the services required, and designating the place or places where the personnel and material will be assembled.
>
> That when any member of the American National Red Cross reports for duty with the land or naval forces of the United States, pursuant to a proper call, he will thereafter be subject to military laws and regulations * * *.

In 1955 President Eisenhower stated that the United States had "prescribed * * * duties to be performed by the Red Cross on behalf of the Government and people of the United States * * *." 69 Stat., pp.

C21–C22; Ex. 27. And in 1918 John W. Davis, then Solicitor General and Counselor for the Red Cross, stated (Ex. 43):

> When any question arises as to the scope and activities of the American Red Cross, it must always be remembered that its charter is not only a grant of power but an imposition of duties.

Agreements between the Red Cross and the United States, such as the one discussed *supra*, p. 7, relating to disaster relief, similarly recognize that the Red Cross is "the agency responsible for providing mass care to persons immediately following a disaster" and state that the Red Cross "agree[s] * * * to discharge its responsibilities in disasters" (Ex. 8).

In view of all these facts, it is not surprising that an official of the Red Cross testified at the trial that the Red Cross believes that its charter imposes upon it the duty, not merely the privilege, of providing the services which it renders (R. 91–92), and that all its programs either directly carry out some of its obligations or prepare it to discharge responsibilities which arise in time of emergency (R. 99–101). See also Sturges, *supra*, at 16–17, reaching the same conclusion.

2. Appellants' next contention is that the Red Cross' activities are not sufficiently subjected to governmental supervision and control to make it an instrumentality of the United States. Congress first granted the Red Cross a federal charter in 1900. However, in 1905 Congress decided "that the importance of the work demands a repeal of the present

charter and a reincorporation of the society under Government supervision."[44] Therefore, Congress provided in the new charter that the Red Cross must each year "transmit to the Secretary of War a report of its proceedings * * *, including a full, complete, and itemized report of receipts and expenditures of whatever kind, which report shall be duly audited by the War Department and a copy * * * transmitted to Congress * * *" (App., *infra*, p. 61). This provision remains in full force. In addition, Congress in 1905 gave the President of the United States power to appoint 12 of the 18 members of the Red Cross' governing body, including the chairman.[45] Subsequently, Congress reduced the number of the Red Cross' directors appointed by the President to 8 of the 50 members of the board, one of whom the President designates as Red Cross' principal officer and the other seven of whom are required to be government officials. App., *infra*, p. 64.

Although the President no longer appoints a majority of Red Cross' board of governors, the federal government still maintains ample supervision of and control over the Red Cross' activities through the "specific duties" imposed upon it by Congress, the existing agreements between Red Cross and various

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[44] App., *infra*, p. 56. See also H. Rep. No. 3146, 58th Cong., 3d Sess., p. 2.

[45] App., *infra*, pp. 59-60. The Act of 1905 further provided that after six Red Cross chapters had been organized, the number of Presidential appointees would be reduced from 12 to 6. *Ibid.*

executive departments, the annual audit of the Red Cross by the Department of Defense, and the facts that Red Cross personnel are subject to Defense Department regulations and, at least in time of war, to the direction of the armed forces in battle areas. Perhaps equally important, if at any time Congress should conclude that the Red Cross was not properly performing its governmental duties, Congress undoubtedly, just as it did in 1905, could repeal the Red Cross' charter, transfer all of its rights, property, and duties to a successor corporation and grant the President power to appoint all or a majority of the new corporation's directors.[46] For these reasons, Congress has recognized several times in the last few years that the Red Cross operates under "such Government supervision as would impart official status." H. Cong. Res. 232, 70 Stat. B 32; Ex. 30. See also, *e.g.*, H. Rep. No. 1728, 82d Cong., 2d Sess., p. 2; Ex. 33.[47]

3. Appellants also argue that Red Cross cannot be a governmental instrumentality because its employees are not employees of the United States. Their reliance on this factor is misplaced, however. The em-

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[46] See App., *infra*, pp. 58–59; see also App., *infra*, p. 61, where Congress has reserved the right to "repeal, alter, or amend" the Red Cross' charter.

[47] Nor does the requirement that the Red Cross reimburse the Defense Department for auditing its annual reports (App., *infra*, p. 66) militate against the status of the Red Cross as a federal instrumentality. It is usual for a government department, agency or instrumentality to reimburse another department, agency or instrumentality for services or supplies received from it (Act of March 4, 1915, c. 143, 38 Stat. 1084, as amended, 31 U.S.C. 686).

ployees of the thousands of national banks are similarly not the employees of the United States, yet this Court and the Congress have recognized the national banks as tax-immune federal instrumentalities ever since *McCulloch* v. *Maryland*. See *e.g.*, *Owensboro National Bank* v. *Owensboro*, 173 U.S. 664, and cases cited *supra*, n. 21, p. 15.[46]

4. Appellants also cite the section of the Federal Disaster Act which provides that "As used in this Act, * * * 'Federal agency' means any department, independent establishment, Government corporation, or other agency of the executive branch of the Federal Government, excepting, however, the American Na-

[46] The fact that employees of a governmental instrumentality which is not owned by the United States will not be regarded as employees of the United States also explains the Secretary of Labor's ruling that the Red Cross is not covered by the Walsh-Healey Act. Appellants' Br. 19. So far as present research discloses, the Secretary of Labor has similarly never attempted to extend the coverage of this act to any other organization which was not owned by the United States, such as a national bank.

Nor are appellants aided by Rev. Rul. 60–36, 1960–1 Cum. Bull. 279. Under 26 U.S.C. § 911, certain citizens of the United States who are living abroad may exclude from their gross income subject to United States income tax certain amounts earned abroad as compensation for personal services. However, this favored treatment does not extend to "amounts paid by the United States or an agency thereof." In Rev. Rul. 60–36 the Commissioner ruled that salary paid by the Red Cross to its employees did not, for this purpose, constitute an amount paid by an agency of the United States. Similarly, amounts paid by national banks to their employees abroad would not come within the statutory phrase. See *Chidester* v. *United States*, 82 F. Supp. 322 (Ct. Cl.) (by implication); *Adams* v. *Commissioner*, P.H. Memo T.C. Dec. par. 63,241 (1963) (by implication).

tional Red Cross" (App. *infra*, p. 68). Rather than reflecting a congressional understanding that the Red Cross is not a federal instrumentality, as appellants suggest, that provision, especially when read in conjunction with the other congressional expressions already discussed, indicates a congressional understanding that the Red Cross might very properly have been deemed embraced by the act's definition of "Federal agency" if not expressly excluded. The Act itself shows that Congress excluded the Red Cross from the definition of federal agency because it wished to deal with the functions and duties of the federal executive agencies separately from those of the Red Cross—giving the former primary responsibility for the public sector and the latter primary responsibility over the private sector. See App., *infra*, p. 69.[49]

5. Nor is there any merit to appellants' claim that the Red Cross cannot qualify as a government instrumentality because it relies mainly on voluntary private contributions. Although Congress decided that the Red Cross should look primarily to the public at large for financial support,[49a] Congress has authorized the federal government to furnish the Red Cross with substantial assistance, such as buildings, supplies, equipment, personnel, transportation, housing and

[49] Appellants suggest that because Congress placed Red Cross' charter in Title 36 of the United States Code, the Red Cross cannot be a federal instrumentality if the other organizations in Title 36—such as the Boy Scouts—are not (Br. 19). Regardless of the minimal weight of this argument, its initial premise is erroneous. Congress neither placed the Red Cross' charter in Title 36 nor has it ever approved the Reviser's action in putting it there.

[49a] See, *e.g.*, H. Cong. Res. 232, *supra*.

communication. See *supra*, pp. 5–6, 6–7, 8. Moreover, Congress has granted the Red Cross several special tax benefits. Before 1944, the Red Cross was regarded as exempt from the federal excise taxes imposed on transportation and communication services because of the general exemption for services furnished to the United States.[50] When Congress repealed this general exemption in 1944, it specifically enacted a new provision exempting such services furnished to "any corporation created by Act of Congress to act in matters of relief under the Treaty of Geneva of August 22, 1864."[51] Additionally, because, as Congress stated, the Red Cross has a "unique * * * quasi-governmental status" (H. Rep. No. 1728, 82d Cong., 2d Sess., p. 2), Congress, in order to encourage private contributions to the Red Cross, granted a special deduction to certain donors to the Red Cross, which is even more favorable than the corresponding deduction for contributions to the State and federal governments. 26 U.S.C. 114. Congress certainly provides for the financial support and assistance of the Red Cross far more than it does for certain other governmental instrumentalities such as national banks. Congress has, through its extensive interest in the Red Cross' financial well-being, demonstrated an awareness that if the Red Cross is unable to obtain sufficient

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[50] Sec. 3469, Internal Revenue Code of 1939, as amended by § 307(a), Revenue Act of 1943, c. 63, 58 Stat. 21 (26 U.S.C. (1952 ed.) 3469), now Internal Revenue Code of 1954, §§ 4253(c), 4263(b).

[51] Exs. 35, 38, 39. See also 12 F.R. 4397 (1947); 28 F.R. 348–349 (1963).

funds through private contributions or if its funds are drained off for taxes on its operations—either State or federal—the government will have either to perform itself some of the duties now handled by the Red Cross or resort to monetary appropriations to the Red Cross.[52]

6. Finally, appellants' comparison of the Red Cross to a mere government contractor is not apt. The relationship between the United States and a profit-making corporation with which it contracts is frequently brief or, at best, intermittent, and the federal government is typically only one of many customers of such a corporation. As this Court has recognized, when a government contractor performs for the United States, it is still seeking its "own private ends" by carrying on "commercial activities * * * for profit" (*United States* v. *Boyd, supra,* 378 U.S. at 48), and it is still "engaged in its own behalf, not the government's, in the conduct of a private business for profit" (*Buckstaff Co.* v. *McKinley,* 308 U.S. 358, 362). The Red Cross, on the other hand, is a permanent and integral part of the United States govern-

[52] If appellants prevail in the instant case, there would be nothing to prevent a State from burdening the Red Cross with substantial tax liabilities, such as gross and net income taxes, sales and use taxes, and numerous other taxes "on the operation of an instrument employed by the government of the Union to carry its powers into execution." *McCulloch* v. *Maryland, supra,* 4 Wheat. at 436–437.

ment (compare *Standard Oil Co.* v. *Johnson, supra*)[53] and engages in no non-governmental or private profit-making activities.[54] Compare *Clallam County* v. *United States, supra,* 263 U.S. at 345, where the Court held that the corporation in question was an instrumentality of the United States, noting that "This is not like the case of a corporation having its own purposes as well as those of the United States and interested in profit on its own account."[55]

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[53] In the *Standard Oil* case the Court, in concluding that post exchanges are governmental instrumentalities, noted that their profits "are used to improve the soldiers' mess, to provide various types of recreation, and in general to add to the pleasure and comfort of the troops" (316 U.S. at 485). The funds and activities of the Red Cross are equally directed toward adding to the pleasure and comfort of the troops in time of war and peace and, in addition, to assisting the general public in case of national disaster.

[54] Moreover, under some circumstances even a government contractor may be a federal instrumentality. See *United States* v. *Livingston*, 179 F. Supp. 9 (E.D.S.C.), affirmed *per curiam*, 364 U.S. 281; *United States* v. *Boyd, supra*, at 45, fn. 6.

[55] Appellants' case is not advanced by reliance on the fact that the Red Cross and its employees are subject to or, as a matter of Red Cross policy, have subjected themselves to various State regulations (R. 105). This Court has recognized that, even though a State may not impose any tax on the operations of a federal instrumentality, it may enforce local regulations which do not impede or burden the instrumentality in the performance of its governmental functions (see, *e.g., Railway Mail Assoc.* v. *Corsi*, 326 U.S. 88, 95; *Anderson National Bank* v. *Luckett*, 321 U.S. 233, 247–253; *Johnson* v. *Maryland*, 254 U.S. 51, 56; see also *Stewart & Co.* v. *Sadrakula*, 309 U.S. 94, 99), and require the payment of a tax on the instrumentality's property as opposed to its operations. See, *e.g., McCulloch* v. *Maryland, supra*, 4 Wheat. at 436–437; *Osborn* v. *Bank of the United States, supra*, at 867; *Thomson* v. *Pacific R.R. Co., supra*, at 589–590; *Railroad Company* v. *Peniston*, 18 Wall. 5, 31.

In sum, in light of the essential governmental duties performed by the Red Cross as an integral part of the federal government, it is an instrumentality of the United States and constitutionally immune from the imposition of a State tax on its operations—including a tax on the privilege of employing people to carry out the duties delegated to it by Congress—unless Congress has explicitly waived such immunity. As we now show, Congress has not done so.

II

CONGRESS HAS NOT WAIVED THE RED CROSS' CONSTITUTIONAL IMMUNITY FROM STATE UNEMPLOYMENT TAXES

Appellants argue that even if (as we contend) the Red Cross is a federal instrumentality, Congress, by the Social Security Amendments of 1960,[*] has waived the constitutional immunity from state unemployment taxes. Br. 37 ff. We submit, however, that a careful analysis of the relevant statutory provisions as they stood before 1960, coupled with an examination of the 1960 amendments in light of their legislative history, demonstrates that Congress has never waived Red Cross' immunity. On the contrary, Congress in passing the legislation recognized that the Red Cross had always been immune from State unemployment taxes and intended specifically to preserve that immunity.

Section 3301 of the Internal Revenue Code imposes a federal excise tax upon employers "with respect to employment," based upon the amount of wages

[*] P.L. 86-778, 74 Stat. 924, § 531.

paid. In general, § 3302 grants the employer a credit (up to 90 percent of the federal tax) for the amount paid to a State unemployment fund which has been approved by the federal government. Section 3306(c) exempts certain employers from the federal tax imposed by § 3301. Before 1960 this section read, in relevant part, as follows:

> § 3306(c). For purposes of this chapter, the term "employment" [as used in § 3301] means any service * * *, except:
>
> * * * * * *
>
> (6) service performed in the employ of the United States Government or of an instrumentality of the United States which is—
>
> (A) wholly owned by the United States, or
>
> (B) exempt from the tax imposed by section 3301 by virtue of any other provision of law;
>
> * * * * * *
>
> (8) service performed in the employ of [a charitable organization] * * *.

Section 3306(c)(8) unquestionally exempted the Red Cross from the federal unemployment tax as a charitable corporation. Additionally, if (as we contend) the Red Cross is an instrumentality of the United States, it would also have been exempted from the federal unemployment tax by § 3306(c)(6), as "an instrumentality of the United States which is * * * exempt from the tax imposed by section 3301 by virtue of" § 3306(c)(8) dealing with charities. Whether the Red Cross was exempted from the *federal* tax under § 3306(c)(6) as well as under § 3306(c)(8) is important in determining whether the Red Cross

could have been required to pay a State unemployment tax. For § 3305, dealing with the power of a State to impose an unemployment tax, provided:

> § 3305(b). The legislature of any State may require any instrumentality of the United States (except such as are (1) wholly owned by the United States, or (2) exempt from the tax imposed by section 3301 by virtue of any other provision of law), and the individuals in its employ, to make contributions to an unemployment fund * * *.

Therefore, if the Red Cross is not an instrumentality of the United States (as appellants contend), no provision of federal law would have prevented a State like Colorado, which taxed both charities and taxable instrumentalities of the United States,[57] from imposing an unemployment tax on the Red Cross. On the other hand, if (as we contend) the Red Cross is an instrumentality of the United States, its constitutional exemption from State unemployment taxes would have been continued by § 3305(b), because it would be an "instrumentality of the United States [which is] * * * exempt from the [federal] tax imposed by section 3301 by virtue of" § 3306(c)(8) relating to charities. With the question of the status of the Red Cross so framed, an Assistant Attorney General of the State of Colorado rendered an advisory opinion that the Red Cross was exempt from the Colorado un-

[57] 4 Colo. Rev. Stat. Ann., §§ 82-6-1, 82-1-3(7)(a), (e)(v).

employment tax as "an instrumentality of the United States."[39]

In 1960 Congress amended §§ 3305 and 3306 to read as follows (italics indicating the material changes):

> § 3305(b). The legislature of any State may require any instrumentality of the United States (*other than an instrumentality to which section 3306(c)(6) applies*), and the individuals in its employ, to make contributions to an unemployment fund * * *.
>
> * * * * *
>
> § 3306(c). For purposes of this chapter, the term "employment" means any service performed * * *, except
>
> * * * * *
>
> (6) service performed in the employ of the United States Government or of an instrumentality of the United States which is—
>
> (A) wholly or partially owned by the United States, or
>
> (B) exempt from the tax imposed by section 3301 by virtue of *any provision of law which specifically refers to such section (or the corresponding section of prior law) in granting such exemption;*
>
> * * * * *
>
> (8) service performed in the employ of [a charitable organization] * * *.

We submit that under the language of these sections, the Red Cross continued to be exempt from

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[39] See *supra*, fn. 41, p. 26. See also Exs. 66, 69, marked for identification but not received in evidence. While the Colorado opinion, dated November 21, 1960, was promulgated shortly after passage of the 1960 amendments, these amendments did not become effective until January 1, 1962.

State unemployment tax, just as it was before 1960. Moreover, the legislative history of the 1960 amendments clearly demonstrates that Congress did not intend to waive Red Cross' constitutional exemption. We first make a detailed examination of the statutory language, and then discuss the amendments' legislative history.

Section 3305(b), as amended in 1960, would permit Colorado to tax the Red Cross unless it is an organization described in § 3306(c)(6). That section would exempt the Red Cross from State taxation only if it is "an instrumentality of the United States which is * * * exempt from the [federal unemployment] tax imposed by section 3301 by virtue of any provision of law which specifically refers to such section * * *." It is undisputed that § 3306(c)(8) exempts the Red Cross from the federal tax imposed by § 3301 (R. 17, 23). The only dispute on this aspect of the case centers on whether § 3306(c)(8) constitutes a sufficiently specific reference to § 3301.

We submit that it does. Section 3306(c)(8)'s sole purpose is to define those organizations which are exempt from the federal tax imposed by § 3301. It accomplishes this by stating that "For purposes of this chapter" (which includes § 3301) services performed for a charity are not within the meaning of "the term employment" (as used in § 3301). The words "For purposes of this chapter" might not at first glance seem to satisfy the requirement of a "provision of law which specifically refers" to § 3301. But the legislative history of the 1960 amendments shows that

what Congress meant was that in order for an instrumentality of the United States to continue to be exempt from State taxation, there must be a provision of federal law granting it specific immunity from the federal unemployment tax imposed by § 3301, rather than, (as appellants contend), that there must be a specific reference to that section by number. Since § 3306(c)(8) specifically exempts the Red Cross from that tax, it follows that Congress in the 1960 amendments did not waive the Red Cross' constitutional immunity from State unemployment taxes.

The purpose of the 1960 amendment was to terminate the exemption from unemployment tax of a number of federal instrumentalities which were engaged in commercial-type activities, primarily banking.[39] These organizations had all been exempt from

[39] The House Committee Report states in part: "The additional Federal instrumentalities brought under the unemployment compensation program by this change will include the Federal Reserve banks, Federal credit unions, Federal land banks, Federal land bank associations, and Federal home loan banks." H. Rep. No. 1799, 86th Cong., 2d Sess., p. 55.

In considering a closely related question—whether to amend § 3306(c)(8) to impose an unemployment tax on organizations which are owned by a charity but carry on a trade or business for profit—the Ways and Means Committee indicated that the primary concern of the 1960 unemployment tax amendments was to provide coverage for organizations which—like the federal financial institutions listed above—engage in "commercial" "profit-making" activities, "compete on the same terms as private concerns," and the employees of which "are susceptible to the same hazards of unemployment as are the workers in similar establishments not owned by nonprofit organizations." *Id.*, p. 56.

the State unemployment tax because provisions in Title 12, U.S.C. (Banks and Banking), exempted them from State taxes in general.[30] Therefore, Congress in 1960 amended §§ 3305 and 3306 to provide that federal instrumentalities (which were not owned by the United States) could be subjected to State unemployment taxes unless the provision of law which exempted them from State taxation specifically referred to § 3301. The House Committee Report shows that what Congress meant to require was not necessarily a reference to § 3301 by number, but *"a provision of law which grants specific exemption from the Federal unemployment tax"* imposed by § 3301. H. Rep. No. 1799, 86th Cong., 2d Sess., p. 55 (emphasis added). This, of course, the various financial institutions described in the House Committee Report did not have, but by virtue of § 3306(c)(8) the Red Cross did have.

Although the House Committee report does not mention the Red Cross by name as an instrumentality which continued to be exempt from State tax, the Chairman of the Ways and Means Committee (which had reported the bill here in question) expressly acknowledged on the floor of the House during the debate on the bill that "it is not the intention of the bill to remove the present exemption of Red Cross * * * from State unemployment taxation." The full text of the exchange between Chairman Mills and Congressman Ikard, who was a member of the

[30] See Mim. 5003, 1940–1 Cum. Bull. 203.

Ways and Means Committee, is as follows (106 Cong. Rec., Part 10, p. 13,827, emphasis added):

Mr. IKARD. Mr. Chairman, I should like to clarify one particular section of the bill.

Section 531 of the bill—pages 143–146 of H.R. 12580—extends coverage under the unemployment compensation program to employees of certain Federal instrumentalities. The extension will make subject to the Federal unemployment tax any Federal instrumentality which is neither wholly nor partially owned by the United States unless it is exempt from the tax by a specific provision of law. The same section authorizes the legislature of any State to subject employment by such Federal instrumentalities to the State's approved unemployment compensation tax laws. Examples of the Federal instrumentalities thus to be covered are given on page 55 of the committee report on the bill—House Report No. 1799.

My purpose is to make it clear that there is no intention to extend coverage to an organization which is now exempt as a charitable corporation but which also is a Federal instrumentality neither wholly nor partially owned by the United States. The American National Red Cross has for many purposes been regarded as an instrumentality of the Federal Government. However, its exemption from Federal unemployment taxes is presently based on that provision of the statute which specifically exempts service performed in the employ of certain charitable corporations from such taxes. H.R. 12580 continues the exemption from unemployment taxes for such chari-

table corporations; hence the bill is not intended to remove the Red Cross' current exemption. *Similarly, it is not the intention of the bill to remove the present exemption of Red Cross employment from State unemployment taxation.*

Mr. MILLS. Mr. Chairman, will the gentleman yield?

Mr. IKARD. I yield to the gentleman.

Mr. MILLS. The gentleman has very clearly stated, may I say, the understanding that I have of the bill in this respect. Certainly his statement is a very clear reflection of what was intended as far as I am concerned.[81]

Moreover, the House Committee Report states that the bill continues a non-government owned instrumentality's exemption from State unemployment taxation if a statute "enacted before" 1960[82] granted it a "specific exemption from the Federal unemployment tax"[83] imposed by § 3301. However, we have been able to find no non-government owned instrumentality, other than the Red Cross, which, at the time of the 1960 amendments, was specifically exempted from the federal unemployment tax. Therefore, if (as appellants contend) the House Committee did not intend to continue the Red Cross' exemption from State unemployment taxation, the language in the Committee Report regarding specific exemp-

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[81] Section 531 of H.R. 12580, 86th Cong., 2d Sess., to which the remarks related, was identical with the enacted Section 531.

[82] H. Rep. No. 1799, 86th Cong., 2d Sess., p. 125.

[83] *Id.*, p. 55.

tions from the § 3301 tax "enacted before" 1960 would be meaningless."[64]

Moreover, there was a good reason why Congress did not waive the Red Cross' exemption from State unemployment tax, but rather confined the 1960 amendments to "commercial" organizations the employees of which "are susceptible to the [usual] * * * hazards of unemployment" (See *supra,* fn. 59, p. 42). Most charities—including the Red Cross—have a far lower turnover of employees than do commercial or industrial ventures,[65] while many State unemployment plans do not give adequate weight, especially in the first few years of coverage, to lower-than-average unemployment experience.[66] Therefore, if Congress had waived the Red Cross' exemption in 1960, it would in effect have allowed the States to subsidize local businesses out of Red Cross funds. As Congress has

[64] A 1957 House Committee Report dealing with a somewhat similar proposed amendment to §§ 3305 and 3306, which was not enacted, contains some language indicating that Congress intended to waive the immunity from State taxation of only those financial institutions listed *supra* in fn. 59, p. 42, and other language indicating that the bill would leave no non-government owned instrumentalities immune from State unemployment tax. H. Rep. 1025, 85th Cong., 1st Sess., p. 2. It is apparent that the 1957 Committee—unlike the 1960 Congress which passed the amendment here in question (see *supra,* pp. 44–45)—failed to consider the Red Cross. Since, so far as we can discover, there were no bills introduced on this subject during 1958 and 1959, the 1957 Committee Report is tenuous evidence of the 1960 Congress' intention.

[65] See generally Hearings Before the Committee on Ways and Means of the House of Representatives, 89th Cong., 1st Sess., on H.R. 8282; Hearings Before the Committee on Finance, United States Senate, 89th Cong., 2d Sess., on H.R. 15119; H. Rep. No. 1636, 89th Cong., 2d Sess., pp. 8–10.

[66] See, *e.g.*, 4 Colo. Rev. Stat. Ann. 82–6–3.

more recently stated, charitable organizations "should not be required to share in the costs of providing benefits to workers in profitmaking enterprises." H. Rep. No. 1636, 89th Cong., 2d Sess., p. 9. In fact, in the instant case, over the 3½ year period that Red Cross was paying unemployment taxes to Colorado, it paid $28,332.19 in tax, while its ex-employees received benefits of only $404.40.[67] During the 1966 session of Congress, both Houses passed, in somewhat differing forms, legislation that would have provided State unemployment coverage for charitable organizations including the Red Cross, while permitting each organization to require that its tax be based on its actual experience in employee turnover. Although there was no substantial disagreement with regard to this provision, Congress was unable to reconcile other differences before adjournment and no legislation was enacted.[68] This is the same concept on which benefits to employees of the federal government are paid. 42 U.S.C. 1361, 1366.

In summary, we submit that the 1960 amendments, far from withdrawing the Red Cross' constitutional immunity, reaffirmed "Red Cross' current exemption * * * from State unemployment taxation." 106 Cong. Rec., Part 10, p. 13,827. This conclusion accords with this Court's long-standing admonition that although Congress may waive the Constitutional im-

[67] Although these figures are not shown in the record, they were submitted to the Red Cross by the appellants and used by the parties to compute the judgment of $27,927.79 (*i.e.*, $28,332.19 of tax imposed on the Red Cross less $404.40 of benefits paid to Red Cross' ex-employees) entered by the district court (R. 29).

[68] H.R. 15119 (1966), discussed in H. Rep. No. 1636, *supra*; 112 Cong. Rec. 13,304, 17,807 (daily ed.).

munity of an instrumentality of the United States, "the waiver must be clear, and every well-grounded doubt upon the subject should be resolved in favor of the exemption." *Austin* v. *The Aldermen,* 74 U.S. 694, 699.

III

THE THREE-JUDGE DISTRICT COURT HAD JURISDICTION TO ENJOIN THE COLLECTION OF THE COLORADO TAX FROM THE RED CROSS

A. SECTION 1341 OF THE JUDICIAL CODE DID NOT BAR THE DISTRICT COURT FROM GRANTING AN INJUNCTION

Appellants contend that 28 U.S.C. 1341 (Appendix, *infra,* p. 74) prohibited the district court from enjoining the collection of the Colorado tax from the Red Cross. That Section prohibits the district courts from "enjoin[ing] * * * or restrain[ing] the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." This provision is inapplicable for two reasons: (1) It does not apply to suits brought by the United States. (2) The courts of Colorado do not provide a "plain, speedy and efficient remedy" because they do not allow interest in suits to recover unemployment taxes.

1. *Section 1341 of the Judicial Code Does Not Apply to Suits Brought by the United States.* Every federal court that has passed on the question has held that 28 U.S.C. 1341 is not applicable to suits by the United States to enjoin the unconstitutional imposition of State taxes. *United States* v. *Arlington County,* 326 F. 2d 929, 931 (C.A. 4); *United States* v. *Bureau of Revenue,* 291 F. 2d 677, 679 (C.A. 10); *United States* v. *Woodworth,* 170 F. 2d 1019 (C.A. 2);

Board of Commissioners v. *United States*, 139 F. 2d 248 (C.A. 10), certiorari denied, 321 U.S. 795; *City of Springfield* v. *United States*, 99 F. 2d 860 (C.A. 1), certiorari denied, 306 U.S. 650; *United States* v. *Livingston*, 179 F. Supp. 9, 11 (E.D. S.C.), affirmed *per curiam*, 364 U.S. 281; *United States* v. *Department of Revenue*, 191 F. Supp. 723, 725 (N.D. Ill.), vacated on other grounds, 368 U.S. 30; *United States* v. *68,716 Square Feet of Land*, 79 F. Supp. 438 (S.D. N.Y.), affirmed on this point, reversed on other grounds *sub. nom. United States* v. *City of New York*, 175 F. 2d 75 (C.A. 2), certiorari denied, 338 U.S. 885; *United States* v. *Okaloosa County*, 59 F. Supp. 426 (N.D. Fla.).

This unbroken line of authority is fully supported by the legislative history of 28 U.S.C. 1341, which shows that it was enacted specifically to prevent out-of-state corporations from challenging state and local taxes in lengthy federal court proceedings (not available to citizens of the State) during the pendency of which payment of taxes was withheld. S. Rep. No. 1035, 75th Cong., 1st Sess., p. 2; H. Rep. No. 1503, 75th Cong., 1st Sess., pp. 2–3; 81 Cong. Rec. 1416–1417. The provision does not in terms refer to the United States, and the legislative history contains no intimation of any intent to make it applicable to the Federal government. Accordingly, this is an appropriate situation for application of the settled principle that "general statutes imposing restrictions do not apply to the Government itself without a clear expression to that effect." *Federal Power Commission* v. *Tuscarora Indian Nation*, 362 U.S. 99, 120. This Court has deemed this principle particularly compelling when

the right of the United States to obtain federal injunctive relief is involved. *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220; *United States* v. *United Mine Workers*, 330 U.S. 258; *United States* v. *American Bell Telephone Co.*, 159 U.S. 548.[58a]

2. *The Colorado Courts Do Not Provide a "Plain, Speedy and Efficient Remedy."* Although the basic purpose of Section 1341 is to require taxpayers ordinarily to pay State taxes and then sue in the State court for a refund, it is settled that a State's refund procedure does not afford a "plain, speedy and efficient remedy" unless the judgment will include interest on the illegally-collected taxes, ~~interest will be paid on any judgment rendered~~. *United States* v. *Livingston*, 179 F. Supp. pp. 9, 15 (E.D.S.C.), affirmed *per curiam*, 364 U.S. 281; cf. *United States* v. *Department of Revenue of State of Ill.*, 191 F. Supp. 723, 726–727 (N.D. Ill.), vacated on other grounds, 368 U.S. 30 (no recovery of appeal bond cost). See also *Educational Films Corp.* v. *Ward*, 282 U.S. 379, 386, fn. 2; *Hopkins* v. *Southern California Tel. Co.*, 275 U.S. 393, 399–340, affirming 13 F. 2d 814, 820 (C.A. 9); *Butler* v. *D. A. Schulte, Inc.*, 67 F. 2d 632, 635 (C.A. 5); *Procter*

[58a] The government's standing as a proper party plaintiff, with a right to seek the declaratory and injunctive relief here requested, is clear; the immunity sought to be vindicated is that of the federal government. *United States* v. *Allegheny County*, 322 U.S. 174, 191; *Query* v. *United States*, 316 U.S. 486; see also *City of Detroit* v. *Murray Corp.*, 355 U.S. 489, 503; *United States* v. *Bureau of Revenue*, *supra*. In these circumstances the government need not show any financial interest, direct or indirect, immediate or remote. *United States* v. *Allegheny County*, *supra*; *in re Debs*, 158 U.S. 564, 584; *United States* v. *Arlington County*, 326 F. 2d 929, 931 (C.A. 4).

& Gamble Distributing Co. v. *Sherman,* 2 F. 2d 165, 166 (S.D.N.Y.); *Nutt* v. *Ellerbe,* 56 F. 2d 1058, 1062–1063 (E.D.S.C.); *Southern Ry. Co.* v. *Query,* 21 F. 2d 333, 342–343 (E.D.S.C.).[69] For, as Judge Learned Hand pointed out in *Procter & Gamble Distributing Co., supra,* "a dollar to-day is worth more than a dollar next year," 2 F. 2d at 166.[70]

No interest can be recovered in the Colorado courts in a suit for the refund of illegally collected unemployment taxes. R. 17; 4 Colo. Rev. Stat. Ann. § 82–9–9 (*Appendix, infra,* p 75); *Brannaman* v. *Richlow Manufacturing Co.,* 106 Colo. 317, 104 P. 2d 897. Under the foregoing principles, therefore, the Colorado courts do not provide a "plain, speedy and efficient remedy," and Section 1341 did not bar the district court from enjoining the collection of the State tax.

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[69] Although these latter cases did not arise under 28 U.S.C. 1341, the general equitable principle that they enunciated is equally applicable here. By use of the traditional equity condition of "plain, speedy and efficient remedy," Congress clearly imported settled principles of federal equity jurisdiction for accommodation of federal and State remedies under 28 U.S.C. 1341. *Great Lakes Dredge & Dock Co.* v. *Huffman,* 319 U.S. 293, 299; *Township of Hillsborough* v. *Cromwell,* 326 U.S. 620, 622–623. The pertinent committee reports state, in fact, that the provision "does not take away any equitable right of the taxpayer." S. Rep. No. 1035, 75th Cong., 1st Sess., p. 2; H. Rep. No. 1503, 75th Cong., 1st Sess., p. 2.

[70] *Bucklin Coal Mining Co* v. *Unemployment Compensation Commission,* 53 F. Supp. 484 (W.D. Mo.), relied on by appellants, neither considers nor rules on the question. And in *Corbett* v. *Printers & Publishers Corp.,* 127 F. 2d 195, 197 (C.A. 9), and *Nevada-California Electric Corp.* v. *Corbett,* 22 F. Supp. 951, 954 (N.D. Cal.), interest was not denied; its running was merely delayed for up to 30 days.

B. THE ELEVENTH AMENDMENT DOES NOT BAR THE MAINTENANCE OF THIS ACTION

There is no merit in appellants' contention that the instant action is barred by the Eleventh Amendment to the federal Constitution. (Br. 37.) For that Amendment does not bar the United States from suing a State (*Monaco* v. *Mississippi*, 292 U.S. 313, 329), even if another party joins the United States as party plaintiff. *Erickson* v. *United States*, 264 U.S. 246, 249. Moreover, since this is an action to restrain a public official from "invad[ing] rights secured by the Federal Constitution," it is not an action against the State and could be maintained by the Red Cross even if the United States were not a party (*Sterling* v. *Constantin*, 287 U.S. 378, 393; see also *Georgia R. Co.* v. *Redwine*, 342 U.S. 299, 304; *Ex Parte Young*, 209 U.S. 123), even though the Red Cross also sought recovery of taxes already illegally exacted.[11]

C. A THREE-JUDGE COURT WAS PROPERLY CONVENED

In *Query* v. *United States*, 316 U.S. 486, the question was whether an action to enjoin the application of a South Carolina license tax to the activities of an army post exchange was, under the predecessor sec-

[11] Apparently in order to avoid an obligation for postjudgment interest the Colorado Department of Employment has already paid the Red Cross the amount of the district court judgment in the instant case. It is apparent that neither appellants nor appellees intended this payment to constitute an accord and satisfaction, and thus we do not believe that the claim for refund of taxes has become moot. Cf. *United States* v. *Hougham*, 364 U.S. 310, 312–313, and cases cited. In any event the claim for an injunction restraining appellant Teets from attempting to collect further taxes is not moot.

tion of 28 U.S.C. 2281, required to be heard by a three-judge court. In holding that a three-judge court was required, this Court said (pp. 489–490):

> The complainants, asserting that the post exchange is a federal instrumentality to which the statutory consent does not apply, rest their entire case upon a non-statutory ground: the immunity from state taxation which they contend must be given, under the Constitution, to the post exchange as an instrumentality of the United States. And notwithstanding its assertion that only the meaning of the federal statute was involved, the District Court nevertheless found it necessary to include in the opinion accompanying the decree a statement that the threats and attempts to enforce the state statute "constitute an interference with the activities of the United States, and are unconstitutional."
>
> Here a substantial charge has been made that a state statute, as applied to the complainants, violates the Constitution. Under such circumstances, we have held that relief in the form of an injunction can be afforded only by a three-judge court pursuant to § 266. * * *

See, also, *Paul* v. *United States,* 371 U.S. 245, 249–250; *United States* v. *Georgia Public Service Commission,* 371 U.S. 285, 287–288.

Here, as in *Query,* the appellees rely upon their constitutional immunity from taxation rather than upon a statute, and the appellants rely upon an act of Congress to show an alleged waiver of that immunity. The principles applied in *Query* thus are equally applicable here. Unlike *Swift & Co.* v. *Wickham,* 382 U.S. 111, *Ex Parte Bransford,* 310 U.S.

354, and *Ex Parte Buder*, 271 U.S. 461, this case does not involve any issue as to the invalidity under the Supremacy Clause of a State statute because of its conflict with an Act of Congress.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted.

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OCTOBER 1966.

APPENDIX

CONSTITUTION OF THE UNITED STATES OF AMERICA:

Amendment XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State.

ACT OF JANUARY 5, 1905, c. 23, 33 Stat. 599:[72]

Whereas on the twenty-second of August, eighteen hundred and sixty-four, at Geneva, Switzerland, plenipotentiaries respectively representing Italy, Baden, Belgium, Denmark, Spain, Portugal, France, Prussia, Saxony, and Wurttemberg and the Federal Council of Switzerland agreed upon ten articles of a treaty or convention for the purpose of mitigating the evils inseparable from war; of ameliorating the condition of soldiers wounded on the field of battle, and particularly providing, among other things, in effect, that persons employed in hospitals and in according relief to the sick and wounded and supplies for this purpose shall be deemed neutral and entitled to protection; and that a distinctive and uniform flag shall be adopted for hospitals and ambulances and convoys of sick and wounded and an arm badge for individuals neutralized; and

Whereas said treaty has been ratified by all of said nations, and by others subsequently, to the number of forty-three or more, including the United States of America; and

[72] The Red Cross' charter, as subsequently amended, now appears in 36 U.S.C. 1–16. See *infra* pp. 61–67 setting forth the sections which have been amended in relevant part.

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Whereas the International Conference of Geneva of eighteen hundred and sixty-three recommended "that there exist in every country a committee whose mission consists in cooperating in times of war with the hospital service of the armies by all means in its power;" and

Whereas a permanent organization is an agency needed in every nation to carry out the purposes of said treaty, and especially to secure supplies and to execute the humane objects contemplated by said treaty, with the power to adopt and use the distinctive flag and arm badge specified by said treaty in article seven, on which shall be the sign of the Red Cross, for the purpose of cooperating with the "Comité International de Secours aux Militaires Blessés" (International Committee of Relief for the Wounded in War); and

Whereas in accordance with the requirements and customs of said international body such an association adopting and using said insignia was formed in the city of Washington, District of Columbia, in July, eighteen hundred and eighty-one, known as "The American National Association of the Red Cross," reincorporated April seventeenth, eighteen hundred and ninety-three, under the laws of the District of Columbia, and reincorporated by Act of Congress in June, nineteen hundred; and

Whereas it is believed that the importance of the work demands a repeal of the present charter and a reincorporation of the society under Government supervision: Now, therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Clara Barton * * * [and certain other named individuals], together with five other persons to be named by the President of the United States, one to be chosen from each of the Departments of State, War, Navy, Treasury, and Justice,

their associates and successors, are hereby created a body corporate and politic in the District of Columbia.

SEC. 2. That the name of this corporation shall be "The American National Red Cross," and by that name shall have perpetual succession, with the power to sue and be sued in courts of law and equity within the jurisdiction of the United States; to have and to hold such real and personal estate as shall be deemed advisable and to accept bequests for the purposes of this corporation hereinafter set forth; to adopt a seal and the same to alter and destroy at pleasure; and to have the right to have and to use, in carrying out its purposes hereinafter designated, as an emblem and badge, a Greek red cross on a white ground, as the same has been described in the treaty of Geneva, August twenty-second, eighteen hundred and sixty-four, and adopted by the several nations acceding thereto; to ordain and establish by-laws and regulations not inconsistent with the laws of the United States of America or any State thereof, and generally to do all such acts and things (including the establishment of regulations for the election of associates and successors) as may be necessary to carry into effect the provisions of this Act and promote the purposes of said organization; and the corporation hereby created is designated as the organization which is authorized to act in matters of relief under said treaty. In accordance with article seven of the treaty, the delivery of the brassard allowed for individuals neutralized in time of war shall be left to military authority.

SEC. 3. That the purposes of this corporation are and shall be—

First. To furnish volunteer aid to the sick and wounded of armies in time of war, in accordance with the spirit and conditions of the conference of Geneva of October, eighteen hun-

dred and sixty-three, and also of the treaty of the Red Cross, or the treaty of Geneva, of August twenty-second, eighteen hundred and sixty-four, to which the United States of America gave its adhesion on March first, eighteen hundred and eighty-two.

Second. And for said purposes to perform all the duties devolved upon a national society by each nation which has acceded to said treaty.

Third. To succeed to all the rights and property which have been hitherto held and to all the duties which have heretofore been performed by the American National Red Cross as a corporation duly incorporated by Act of Congress June sixth, nineteen hundred, which Act is hereby repealed and the organization created thereby is hereby dissolved.

Fourth. To act in matters of voluntary relief and in accord with the military and naval authorities as a medium of communication between the people of the United States of America and their Army and Navy, and to act in such matters between similar national societies of other governments through the "Comité International de Secours," and the Government and the people and the Army and Navy of the United States of America.

Fifth. And to continue and carry on a system of national and international relief in time of peace and apply the same in mitigating the sufferings caused by pestilence, famine, fire, floods, and other great national calamities, and to devise and carry on measures for preventing the same.

SEC. 4. That from and after the passage of this Act it shall be unlawful for any person within the jurisdiction of the United States to falsely and fraudulently hold himself out as, or represent or pretend himself to be, a member of, or an agent for, the American National Red Cross, for the purpose of soliciting, collecting,

or receiving money or material; or for any person to wear or display the sign of the Red Cross, or any insignia colored in imitation thereof for the fraudulent purpose of inducing the belief that he is a member of, or an agent for, the American National Red Cross. Nor shall it be lawful for any person or corporation, other than the Red Cross of America, not now lawfully entitled to use the sign of the Red Cross, hereafter to use such sign or any insignia colored in imitation thereof for the purposes of trade or as an advertisement to induce the sale of any article whatsoever. If any person violates the provisions of this section, he shall be guilty of a misdemeanor and shall be liable to a fine of not less than one nor more than five hundred dollars, or imprisonment for a term not exceeding one year, or both, for each and every offense. The fine so collected shall be paid to the American National Red Cross.

SEC. 5. That the governing body of the said American National Red Cross shall consist, in the first instance, of a central committee numbering eighteen persons, to be appointed in the manner following, namely: Six by the incorporators herein named and twelve by the President of the United States, one of whom shall be designated by the President to act as chairman. It shall be the duty of the central committee to organize with as little delay as possible State and Territorial societies, including the District of Columbia, under such rules as the said committee may prescribe. When six or more State or Territorial societies have been formed, thereafter the central committee shall be composed as follows: Six to be appointed by the incorporators, six by the representatives of the State and Territorial societies at the annual meeting of the incorporators and societies, and six by the President of the United States, one of whom shall be

designated by him as chairman and one each to be named by him from the Departments of State, War, Navy, Treasury, and Justice.

The first six members of the central committee elected by the incorporators at the first annual meeting, and the first six members of the central committee elected by the State and Territorial delegates, shall when elected select by lot from their number two members to serve one year, two members to serve two years, and two members to serve three years, and each subsequent election of members shall be for a period of three years or until their successors are duly elected and qualify. The six members of the central committee appointed by the President at the annual meeting shall serve for one year.

The President shall fill as soon as may be any vacancy that may occur by death, resignation, or otherwise in the chairmanship or in the membership of the central committee appointed by him. And any vacancy that may occur in the six members of the central committee herein provided to be appointed by the incorporators or in the six to be appointed by the representatives of the State societies shall be filled by temporary appointments to be made by the remaining members of the six in which the vacancy or vacancies may occur, such appointees to serve until the next annual meeting.

The central committee shall have power to appoint from its own members an executive committee of seven persons, five of whom shall be a quorum, who, when the central committee is not in session, shall have and exercise all the powers of the central committee.

The Secretary of War shall within thirty days after the passage of this Act call a meeting at a time and place to be designated by him in the city of Washington of the incorporators hereunder, giving at least thirty days' notice thereof

in one or more newspapers, and the annual meeting of said incorporators, their associates and successors, shall thereafter be held in said city on the first Tuesday after the first Monday in December, the first of said meetings to be held in December, nineteen hundred and five. Fifteen members shall constitute a quorum at any annual or special meeting.

Voting by proxy shall not be allowed at any meeting of the incorporators, annual or special, nor at any meeting of State or Territorial societies organized under the provisions of this charter.

SEC. 6. That the said American National Red Cross shall on the first day of January of each year make and transmit to the Secretary of War a report of its proceedings for the preceding year, including a full, complete, and itemized report of receipts and expenditures of whatever kind, which report shall be duly audited by the War Department, and a copy of said report shall be transmitted to Congress by the War Department.

SEC. 7. That Congress shall have the right to repeal, alter, or amend this Act at any time.

THE PORTIONS OF THE ACT OF 1905 WHICH HAVE BEEN AMENDED IN RELEVANT PART NOW READ AS FOLLOWS (36 U.S.C.):

§1a. CONTINUATION OF CORPORATION; INCORPORATORS; POWERS AND DUTIES.

The corporation now existing as The American National Red Cross under sections 1, 2, 3, 4a—6, 8, and 9 of this title shall continue as a body corporate and politic in the District of Columbia. The first national convention after May 8, 1947 shall be convened and held under rules and regulations prescribed by the governing body of the corporation as presently constituted. After such first national convention,

the Board of Governors of the corporation from time to time shall constitute the associates and successors of the incorporators named in said sections, and neither the said incorporators nor any associates or successors theretofore designated by them or by their successors shall have any powers or duties.

* * * * *

§3. PURPOSES OF CORPORATION.

The purposes of the corporation are and shall be—

First. To furnish volunteer aid to the sick and wounded of Armed Forces in time of war, in accordance with the spirit and conditions of the conference of Geneva of October, eighteen hundred and sixty-three, and also of the treaties of the Red Cross, or the treaties of Geneva, of August twenty-second, eighteen hudred and sixty-four, and July twenty-seventh, nineteen hundred and twenty-nine, to which the United States of America has given its adhesion, and also of any other treaty or convention similar in purpose to which the United States of America may hereafter give its adhesion.

Second. And for said purposes to perform all the duties devolved upon a national society by each nation which has acceded to any of said treaties or conventions.

Third. To succeed to all the rights and property which were prior to January 5, 1905, held and to all the duties which were prior to January 5, 1905, performed by the American National Red Cross as a corporation duly incorporated by Act of Congress June 6, 1900, which Act is repealed and the organization created thereby is dissolved.

Fourth. To act in matters of voluntary relief and in accord with the military authorities as a medium of communication between the peo-

ple of the United States of America and their Armed Forces, and to act in such matters between similar national societies of other governments through the "Comité International de Secours", and the Government and the people and the Armed Forces of the United States of America.

Fifth. And to continue and carry on a system of national and international relief in time of peace and apply the same in mitigating the sufferings caused by pestilence, famine, fire, floods, and other great national calamities, and to devise and carry on measures for preventing the same.

* * * * *

§ 4a. MEMBERSHIP; STATUS OF CHAPTERS; RULES AND REGULATIONS GOVERNING CHAPTERS; ELECTION OF OFFICERS.

Membership in the American National Red Cross shall be open to all the people of the United States, its Territories, and dependencies, upon payment of the sums specified from time to time in the bylaws.

The chapters of the American National Red Cross shall be the local units of the corporation within the States and Territories of the United States. The regulations with respect to the granting of charters to the chapters and the revocation of the same, the territorial jurisdiction of the chapters, the relationship of the chapters to the corporation and compliance by the chapters with the policies and rules of the corporation, shall be as determined from time to time by the Board of Governors. Such regulations shall require that each chapter shall, in the election of the governing body of the chapter and in the selection of delegates to the national convention of the corporation, adhere to democratic principles of election as specified in the bylaws.

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§ 5. BOARD OF GOVERNORS; NUMBER; ELECTION; TENURE; FILLING VACANCIES; ANNUAL MEETINGS; VOTING BY PROXY.

The governing body of the corporation in which all powers of government, direction, and management of the corporation shall be lodged, shall consist of a Board of Governors numbering fifty persons, to be appointed or elected in the manner following, namely:

(a) Eight Governors shall be appointed by the President of the United States. Of the Governors so appointed, one shall be designated by the President of the United States to act as the principal officer of the corporation with such title and such functions as may from time to time be prescribed in the bylaws; and the remainder shall be officials of departments and agencies of the Federal Government, whose positions and interests are such as to qualify them to contribute toward the accomplishment of Red Cross programs and objectives. Of these at least one and not more than three shall be selected from the armed forces.

(b) Thirty Governors shall be elected by the chapters. The Governors so elected shall be elected at the national convention under procedures for nomination and election which shall be such as to insure equitable representation of all the chapters, having regard to geographical considerations, to the size of the chapters and to the size of the populations served by the chapters.

(c) Twelve Governors shall be elected by the Board of Governors as members-at-large. The Governors so elected shall be individuals who are representative of the national interests which it is the function of the Red Cross to serve, and with which it is desirable that the corporation shall have close association.

The term of office of all Governors shall be three years, except that the term of office of any Governor appointed by the President of the United States (other than the principal officer of the corporation) shall expire if and when such Governor shall retire, prior to the date on which his term as Governor would otherwise expire, from the official position held at the time of his appointment as Governor.

Of the first Board of Governors to be selected hereunder, those Governors to be elected pursuant to subsection (b) of this section shall be elected at the first national convention following May 8, 1947, those Governors to be elected pursuant to subsection (c) of this section shall be elected as soon as practicable following such first national convention, and those Governors to be appointed pursuant to subsection (a) of this section shall be appointed so as to take office at the same time. The Governors so elected pursuant to subsections (b) and (c) of this section shall be divided by lot into three classes, the terms of which shall expire at the end of one, two, and three years, respectively, so that thereafter one-third of the members of the Board of Governors elected pursuant to subsections (b) and (c) of this section will be chosen at the time of each national convention, and shall take office at such time or as soon as practicable thereafter.

The President of the United States shall fill as soon as may be any vacancy that may occur by death, resignation, or otherwise in the office of the principal officer of the corporation or in the membership of the Board of Governors appointed by him. Any vacancy that may occur in the Governors elected by the chapters pursuant to subsection (b) of this section or in the Governors-at-large elected by the Board of Governors pursuant to subsection (c) of this sec-

tion, shall be temporarily filled by appointment made by the Board of Governors, such appointees to serve until the next national convention.

The Board of Governors shall have power (i) to appoint from its own members an executive committee of not less than eleven persons, who, when the Board of Governors is not in session, shall have and exercise all the powers of the Board of Governors, and (ii) to appoint and remove, or provide for the appointment and removal of, all officers and employees of the corporation, except the principal officer designated by the President of the United States.

* * * * *

§ 7. REIMBURSEMENT OF DEPARTMENT OF DEFENSE FOR AUDITING EXPENSES.

The American National Red Cross annually shall reimburse the Department of Defense for auditing its accounts, and the sum so paid shall be covered into the Treasury of the United States as a miscellaneous receipt.

* * * * *

§ 13. PERMANENT BUILDING AT HEADQUARTERS IN WASHINGTON, D.C.

The permanent building erected upon square 172 in the city of Washington, District of Columbia, for the use of the American National Red Cross in connection with its work in cooperation with the Government of the United States shall remain the property of the United States but under the supervision of the Administrator of General Services and the American National Red Cross shall at all times be charged with the responsibility, the care, keeping, and maintenance of said building without expense to the United States.

* * * * *

§ 15. MEMORIAL BUILDING TO WOMEN OF WORLD WAR I; EXPENDITURES; SUPERVISION.

The memorial building to commemorate the services and sacrifices of the patriotic women of the United States of America, of its insular possessions, and of the District of Columbia during the World War, erected on the land occupied in part on June 7, 1924, by the Memorial to the Women of the Civil War, the permanent headquarters of the American Red Cross, shall be used by the American National Red Cross.

The expenditures for said memorial building shall be made under the direction of a commission consisting of the chairman of the Senate Committee on the Library and the chairman of the House Committee on the Library. Said memorial building shall remain the property of the United States Government but under the supervision of the Administrator of General Services, and the American Red Cross shall at all times be charged with the responsibiilty, the care, keeping, and maintenance of the said memorial building without expense to the United States.

* * * * * *

ACT OF SEPTEMBER 30, 1950, c. 1125, 64 STAT. 1109 (FEDERAL DISASTER ACT) (42 U.S.C. 1855g):

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it is the intent of Congress to provide an orderly and continuing means of assistance by the Federal Government to States and local governments in carrying out their responsibilities to alleviate suffering and damage resulting from major disasters, to repair essential public facilities in major disasters, and to foster the development of such State and local organizations and

plans to cope with major disasters as may be necessary.

SEC. 2. As used in this Act, the following terms shall be construed as follows unless a contrary intent appears from the context:

(a) "Major disaster" means any flood, drought, fire, hurricane, earthquake, storm, or other catastrophe in any part of the United States which, in the determination of the President, is or threatens to be of sufficient severity and magnitude to warrant disaster assistance by the Federal Government to supplement the efforts and available resources of States and local governments in alleviating the damage, hardship, or suffering caused thereby, and respecting which the governor of any State (or the Board of Commissioners of the District of Columbia) in which such catastrophe may occur or threaten certifies the need for disaster assistance under this Act, and shall give assurance of expenditure of a reasonable amount of the funds of the government of such State, local governments therein, or other agencies, for the same or similar purposes with respect to such catastrophe;

* * * * *

(f) "Federal agency" means any department, independent establishment, Government corporation, or other agency of the executive branch of the Federal Government, excepting, however, the American National Red Cross.

SEC. 3. In any major disaster, Federal agencies are hereby authorized when directed by the President to provide assistance (a) by utilizing or lending, with or without compensation therefor, to States and local governments their equipment, supplies, facilities, personnel, and other resources, other than the extension of credit under the authority of any Act; (b) by distributing, through the American National Red Cross or otherwise, medicine, food, and

other consumable supplies; (c) by donating to States and local governments equipment and supplies determined under then existing law to be surplus to the needs and responsibilities of the Federal Government; and (d) by performing on public or private lands protective and other work essential for the preservation of life and property, clearing debris and wreckage, making emergency repairs to and temporary replacements of public facilities of local governments damaged or destroyed in such major disaster, and making contributions to States and local governments for purposes stated in subsection (d). The authority conferred by this Act, and any funds provided hereunder shall be supplementary to, and not in substitution for, nor in limitation of, any other authority conferred or funds provided under any other law. Any funds received by Federal agencies as reimbursement for services or supplies furnished under the authority of this section shall be deposited to the credit of the appropriation or appropriations currently available for such services or supplies. The Federal Government shall not be liable for any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government in carrying out the provisions of this section.

SEC. 4. In providing such assistance hereunder, Federal agencies shall cooperate to the fullest extent possible with each other and with States and local governments, relief agencies, and the American National Red Cross, but nothing contained in this Act shall be construed to limit or in any way affect the responsibilities of the American National Red Cross under the Act approved January 5, 1905 (33 Stat. 599), as amended.

SEC. 5. (a) In the interest of providing maximum mobilization of Federal assistance under this Act, the President is authorized to coordinate in such manner as he may determine the activities of Federal agencies in providing disaster assistance. The President may direct any Federal agency to utilize its available personnel, equipment, supplies, facilities, and other resources, in accordance with the authority herein contained.

(b) The President may, from time to time, prescribe such rules and regulations as may be necessary and proper to carry out any of the provisions of this Act, and he may exercise any power or authority conferred on him by any section of this Act either directly or through such Federal agency as he may designate.

* * * * *

10 U.S.C.:

§ 2542. EQUIPMENT FOR INSTRUCTION AND PRACTICE: AMERICAN NATIONAL RED CROSS.

The Secretary of a military department, under regulations to be prescribed by him, may lend equipment under the jurisdiction of that department that is on hand, and that can be temporarily spared, to any organization formed by the American National Red Cross that needs it for instruction and practice for the purpose of aiding the Army, Navy, or Air Force in time of war. The Secretary shall by regulation require the immediate return, upon request, of equipment lent under this section. The Secretary shall require a bond, in double the value of the property issued under this section, for the care and safekeeping of that property and for its return when required.

* * * * *

§ 2602. AMERICAN NATIONAL RED CROSS: COOPERATION AND ASSISTANCE.

(a) Whenever the President finds it necessary, he may accept the cooperation and assistance of the American National Red Cross, and employ it under the armed forces under regulations to be prescribed by the Secretary of Defense.

(b) Personnel of the American National Red Cross who are performing duties in connection with its cooperation and assistance under subsection (a) may be furnished—

(1) transportation, at the expense of the United States, while traveling to and from, and while performing, those duties, in the same manner as civilian employees of the armed forces;

(2) meals and quarters, at their expense or at the expense of the American National Red Cross, except that where civilian employees of the armed forces are quartered without charge, employees of the American National Red Cross may also be quartered without charge; and

(3) available office space, warehousing, wharfage, and means of communication, without charge.

(c) No fee may be charged for a passport issued to an employee of the American National Red Cross for travel outside the United States to assume or perform duties under this section.

(d) Supplies of the American National Red Cross, including gifts for the use of the armed forces, may be transported at the expense of the United States, if it is determined under regulations prescribed under subsection (a) that they are necessary to the cooperation and assistance accepted under this section.

(e) For the purposes of this section, employees of the American National Red Cross

may not be considered as employees of the United States.

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§ 2670. LICENSES: MILITARY INSTALLATIONS; ERECTION, AND USE OF BUILDINGS; AMERICAN NATIONAL RED CROSS.

Under such conditions as he may prescribe, the Secretary of any military department may issue a revocable license to the American National Red Cross to—

(1) erect and maintain, on any military installation under his jurisdiction, buildings for the storage of supplies; or

(2) use, for the storage of supplies, buildings erected by the United States.

Supplies stored in buildings erected or used under this section are available to aid the civilian population in a serious national disaster.

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§ 3539. AMERICAN NATIONAL RED CROSS: DETAIL OF OFFICERS OF ARMY MEDICAL SERVICE.

(a) The President may detail not more than five commissioned officers of the Army Medical Service for duty with the Service to the Armed Forces Division of the American National Red Cross.

(b) The Secretary of the Army may detail a commissioned officer of the Medical Corps to be in charge of the first-aid department of the American National Red Cross.

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§ 5987. AMERICAN NATIONAL RED CROSS: DETAIL OF OFFICERS IN THE MEDICAL CORPS.

The Secretary of the Navy may detail one or more officers in the Medical Corps of the Navy for duty with the Services to the Armed Forces Division of the American National Red Cross.

INTERNAL REVENUE CODE OF 1954 (26 U.S.C.):

SEC. 3305. APPLICABILITY OF STATE LAW.

* * * * * *

(b) [as amended by Sec. 531(a), Social Security Amendments of 1960, P.L. 86-778, 74 Stat. 924] Federal Instrumentalities in General.—The legislature of any State may require any instrumentality of the United States (other than an instrumentality to which section 3306 (c)(6) applies), and the individuals in its employ, to make contributions to an unemployment fund under a State unemployment compensation law approved by the Secretary of Labor under section 3304 and (except as provided in section 5240 of the Revised Statutes, as amended (12 U.S.C., sec. 484), and as modified by subsection (c)), to comply otherwise with such law. * * *

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SEC. 3306. DEFINITIONS.

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(c) [as amended by Secs. 531(c), 532(a), and 533, Social Security Amendments of 1960, *supra*] *Employment.*—For purposes of this chapter, the term "employment" means any service performed prior to 1955, which was employment for purposes of subchapter C of chapter 9 of the Internal Revenue Code of 1939 under the law applicable to the period in which such service was performed, and any service, of whatever nature, performed after 1954 by an employee for the person employing him, irrespective of the citizenship or residence of either, (A) within the United States, or (B) on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which

and while the employee is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aircraft when outside the United States, except—

* * * * *

(6) service performed in the employ of the United States Government or of an instrumentality of the United States which is—

(A) wholly or partially owned by the United State, or

(B) exempt from the tax imposed by section 3301 by virtue of any provision of law which specifically refers to such section (or the corresponding section of prior law) in granting such exemption;

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(8) service performed in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3) which is exempt from income tax under section 501(a);

* * * * *

28 U.S.C.:

SEC. 1341. TAXES BY STATES.

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

COLORADO EMPLOYMENT SECURITY ACT, 4 Colo. Rev. Stat. Ann.:

82-6-1. *Payment.*—(1) Contributions shall accrue and become payable by each employer for each calendar year in which he is subject to this chapter, with respect to wages for employment. Such contributions shall become due and be paid by each employer to the department for

the fund in accordance with such regulations as the commission may prescribe, and shall not be deducted, in whole or in part, from the wages of individuals in such employer's employ.

* * * * *

82–9–9. *Refunds.*—(1) An employing unit may file a written application for refund of money paid erroneously, and if the department shall determine that such payment, or any portion thereof, was paid erroneously, the department shall either issue to the employing unit a credit memo therefor, or make a refund thereof, in either event without interest thereon. In no event may an employing unit recover money paid erroneously or otherwise, which has been paid prior to the first day of January of the first year of the two calendar years immediately preceding the date of the filing of the application for refund. If such application for refund is refused, or if no final action is taken thereon within six months, an employing unit may commence an action in the district court for the city and county of Denver for the collection thereof. In the event of court action no recovery of any money paid prior to the first day of January of the first year of the two calendar years immediately preceding the date of the filing of the application shall be allowed. For like cause and for the same period a recovery as above indicated may be allowed on the department's own initiative.

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U.S. GOVERNMENT PRINTING OFFICE:1966

SUPREME COURT OF THE UNITED STATES

No. 78.—October Term, 1966.

Department of Employment et al., Appellants, *v.* United States et al.	On Appeal From the United States District Court for the District of Colorado.

[December 12, 1966.]

Mr. Justice Fortas delivered the opinion of the Court.

Colorado is one of three States[1] whose Employment Security Act imposes an unemployment compensation tax upon charitable institutions, the tax being measured by the amount of wages paid to the institution's employees. 4 Colo. Rev. Stat. Ann. § 82–6–1. When the State's Department of Employment sought to enforce the tax upon wages paid Colorado-based employees of the American National Red Cross (hereinafter referred to as Red Cross), the Red Cross objected that as a "federal instrumentality" it was immune from such taxation. See *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819). Tax payments aggregating more than $10,000 were made under protest, applications for refund accompanying each payment. The Department of Employment denied each such application. Thereupon the Red Cross, along with the United States as co-plaintiff, invoked the jurisdiction of a three-judge federal district court to enjoin enforcement against it of the Colorado Employment Security Act on the ground that as applied to it, a federal instrumentality, the statute violated the

[1] The other States are Alaska and Hawaii. See Alaska Stat. § 23.20.525 (b)(7) (1966); Hawaii Rev. Laws § 93–7 (i) (Supp. 1963).

Federal Constitution. See 28 U. S. C. § 2281.[2] The Department of Employment responded that the Red Cross was not a federal instrumentality, that any immunity it might have had been waived by Congress in the 1960 amendments to the Federal Unemployment Tax Act (26 U. S. C. § 3301 *et seq.*), and that in any event the Red Cross had failed to exhaust available administrative and state judicial remedies. The three-judge federal District Court ruled in favor of the Red Cross and the United States on each of these issues, ordered a refund of taxes already paid, and enjoined enforcement of the tax statute against the Red Cross. Pursuant to 28 U. S. C. § 1253,[3] the Department of Employment and its executive director sought direct review here. In setting the case for argument, we postponed consideration of questions pertaining to our jurisdiction and that of the three-judge court. 384 U. S. 949 (1966).

We are persuaded that there exist no jurisdictional barriers to our disposition of this appeal on the merits. Any challenge to the applicability of the three-judge court provision, 28 U. S. C. § 2281, is foreclosed by this Court's decision in *Query* v. *United States*, 316 U. S. 486 (1942), where the Court held that three judges were required to entertain a suit to enjoin a state tax statute sought to be enforced against an Army Post Exchange

[2] The statute provides that "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State . . . shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

[3] Section 1253 authorizes direct appeal to this Court from an order granting an injunction in any proceeding "required by any Act of Congress to be heard and determined by a district court of three judges."

which asserted its immunity as a federal instrumentality,[4] and we do not consider that our later decision in *Swift & Co.* v. *Wickham*, 382 U. S. 111 (1965), requires a different conclusion. Nor is there compelling force in the argument, advanced by appellants, that the Tax Injunction Act (28 U. S. C. § 1341)[5] requires appellees, first, to exhaust their state remedies, which are alleged by appellants to be "plain, speedy and efficient." We need not decide whether omission to provide interest on a successful refund application renders the state remedy here an inadequate one within the meaning of § 1341. For we conclude, in accord with an unbroken line of authority[6] and convincing evidence of legislative purpose,[7] that § 1341 does not act as a restriction upon suits by the United States to protect itself and its instrumentalities from unconstitutional state exactions. With respect to

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[4] See also *United States* v. *Georgia Pub. Serv. Comm'n*, 371 U. S. 285, 287 (1963); *Paul* v. *United States*, 371 U. S. 245, 249–250 (1963). Compare Currie, The Three-Judge District Court in Constitutional Litigation, 32 U. Chi. L. Rev. 1, 37–50 (1964), with Note, The Three-Judge District Court: Scope and Procedure Under Section 2281, 77 Harv. L. Rev. 299, 312–313 (1963).

[5] Section 1341 provides that "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

[6] *United States* v. *Arlington County, Commonwealth of Virginia*, 326 F. 2d 929, 931 (C. A. 4th Cir. 1964); *United States* v. *Bureau of Revenue of State of N. M.*, 291 F. 2d 677, 679 (C. A. 10th Cir. 1961); *United States* v. *Woodworth*, 170 F. 2d 1019 (C. A. 2d Cir. 1948); *City of Springfield* v. *United States*, 99 F. 2d 860, 862 (C. A. 1st Cir. 1938), cert. denied, 306 U. S. 650 (1939); *United States* v. *Livingston*, 179 F. Supp. 9, 11–12 (D. C. E. D. S. C. 1959), aff'd, 364 U. S. 281 (1960).

[7] See S. Rep. No. 1035, 75th Cong., 1st Sess., pp. 2–3 (1937); H. R. Rep. No. 1503, 75th Cong., 1st Sess., pp. 2–3 (1937); 81 Cong. Rec. 1416–1417 (1937).

appellants' contention that the State of Colorado has not consented to suit in a federal forum even where plaintiff is the United States, see *Monaco* v. *Mississippi*, 292 U. S. 313 (1934), and *Ex parte Young*, 209 U. S. 123 (1908).

On the merits, we hold that the Red Cross is an instrumentality of the United States for purposes of immunity from state taxation levied on its operations, and that this immunity has not been waived by congressional enactment. Although there is no simple test for ascertaining whether an institution is so closely related to governmental activity as to become a tax-immune instrumentality, the Red Cross is clearly such an instrumentality. See generally, Sturges, The Legal Status of the Red Cross, 56 Mich. L. Rev. 1 (1957). Congress chartered the present Red Cross in 1905, subjecting it to governmental supervision and to a regular financial audit by the Defense, then War, Department. 36 U. S. C. § 1 *et seq.* Its principal officer is appointed by the President, who also appoints seven (all government officers) of the remaining 49 Governors. 36 U. S. C. § 5. By statute and Executive Order there devolved upon the Red Cross the right and the obligation to meet this Nation's commitments under various Geneva Conventions,[8] to perform a wide variety of functions indispensable to the workings of our Armed Forces around the globe,[9] and to assist the Federal Government in providing disaster assistance to the States in time of need.[10]

[8] *E. g.*, Geneva Convention of August 22, 1864, For the Amelioration of the Condition of the Wounded in Armies in the Field, 22 Stat. 940 (1882); Geneva Convention of July 27, 1929, For the Amelioration of the Condition of the Wounded and Sick of Armies in the Field, 47 Stat. 2074 (1932); Geneva Convention of August 12, 1949, For the Multilateral Protection of War Victims, 6 U. S. T. & O. I. A. 3114.

[9] See, *e. g.*, 10 U. S. C. § 2602; 36 U. S. C. § 3.

[10] See 36 U. S. C. § 3; 42 U. S. C. §§ 1855–1855g.

Although its operations are financed primarily from voluntary private contributions, the Red Cross does receive substantial material assistance from the Federal Government.[11] And time and time again, both the President and the Congress have recognized and acted in reliance upon the Red Cross' status virtually as an arm of the Government.[12] In those respects in which the Red Cross differs from the usual government agency—*e. g.*, in that its employees are not employees of the United States, and that government officials do not direct its everyday affairs—the Red Cross is like other institutions—*e. g.*, national banks—whose status as tax-immune instrumentalities of the United States is beyond dispute.

Nor did Congress, in the course of amending the federal unemployment compensation tax statute in 1960, strip away any of this immunity. Certainly there was no intent to do so. Indeed, in debate on the floor of the House, Chairman Mills and Congressman Ikard of the Ways and Means Committee expressed their view, which was not controverted, that the Red Cross' immunity from state and federal unemployment compensation taxes would survive the amendments. 106 Cong. Rec. 13,827 (1960). And the House Committee Report stated that no nongovernment-owned instrumentality which enjoyed immunity from the federal tax prior to 1960—the Red Cross had such an exemption—was to lose its state-tax immunity. H. R. Rep. No. 1799, 86th Cong., 2d Sess., pp. 55–56, 125 (1960). Finally, the present statutory scheme does not deprive the Red Cross of immunity. That the Red Cross enjoyed immunity prior to the 1960 amendments seems clear, and

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[11] See, *e. g.*, 36 U. S. C. § 13 (permanent headquarters building).

[12] See, *e. g.*, Proclamation of President Taft, August 22, 1911, 37 Stat. 1716; 42 U. S. C. §§ 1855a (f), b, c; H. Cong. Res. 232, 70 Stat. B. 32 (1956); H. R. Rep. No. 1728, 82d Cong., 2d Sess., p. 2 (1952).

was at the time conceded by the State of Colorado.[13] Under the pre-existing scheme, § 3305 (b) of Title 26 exempted from state taxation any federal instrumentality exempt from the federal unemployment compensation tax imposed by § 3301. The Red Cross was so exempt as the result of §§ 3306 (c)(6)(B) and 3306 (c)(8), which referred to "service performed in the employ of [a charitable organization]." As amended in 1960, § 3305 (b) continues the state-tax immunity for any "instrumentality to which section 3306 (c)(6) applies." And the later section as amended includes employment "exempt from the tax imposed by section 3301 by virtue of any provision of law which specifically refers to such section . . . in granting such exemptions." 26 U. S. C. § 3306 (c)(6)(B). Although § 3306 (c)(8) which exempts from the federal tax "service performed in the employ of a [charitable institution]," does not contain an explicit citation to § 3301, its sole function is to exempt certain employment from the reach of that section. We hold that federal instrumentalities like the Red Cross, exempted from the federal tax by virtue of § 3306 (c)(8), are likewise exempt from state taxation under § 3306 (c)(6)(B).

Accordingly, the judgment appealed from is

Affirmed.

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[13] Such was the opinion of Assistant Attorney General McKevitt, who so informed appellant Department of Employment. See letter of the Assistant Attorney General to appellee Red Cross, dated November 21, 1960, exhibit 2, in support of appellee's motion for summary judgment below.